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TRANSCRIPT OF RECORD.

SUPREME CO[illegible] ——— UNITED STATES.

CIRCUIT COURT OF
WESTERN DISTRICT O[illegible]

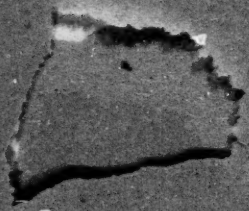
THE TOWN OF KOSHKONONG, PLAINTIFF IN ERROR,

vs.

OSCAR A. BURTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED APRIL 18, 1881.



SUPREME COURT OF THE UNITED STATES.

No. 827.

THE TOWN OF KOSHKONING, PLAINTIFF IN ERROR,

vs.

OSCAR A. BURTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

INDEX.

	Original.	Print.
Writ of error	1	1
Præcipe	2	1
Bond for costs	3	2
Complaint	4	2
Summons	18	4
Return	19	9
Answer	20	10
Stipulation waiving jury	21	10
Hearing	22	11
Finding	23	11
Judgment	25	13
Opinion	26	13
Assignment of errors	35	17
Certificate	34	16
Bond on appeal	37	18
Citation	39	18

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the western district of Wisconsin, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Oscar A. Burton and the Town of Koshkonong, a manifest error hath happened, to the great damage of the said the Town of Koshkonong, as by its complaint appears, we being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf; do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the tenth day of October, A. D. 1881, next, in the said Supreme Court to be then and there held; that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, the 11th day of October, in the year of our Lord one thousand eight hundred and eighty.

[SEAL.] F. M. STEWART,
Clerk Circuit Court U. S. West'n Dist. of Wis.

The return of the annexed writ appears by the schedule hereto annexed.

The return of the judges of the circuit court of the United States for the western district of Wisconsin.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said circuit court at my office in the city of Madison, in said district, this 13th day of April, A. D. 1881, and of our Independence the one hundred and fifth year.

[SEAL.] F. M. STEWART,
Clk U. S. Circuit Court West'n Dist. of Wis.

2 UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

At a stated term of the circuit court of the United States of America for the western district of Wisconsin, begun and held according to law at the city of Madison, in said district, on the first Monday (being the seventh day) of June, A. D. 1880.

Present and presiding the honorable Ramanzo Bunn, district judge.

On the 64th day of said term, to wit, on the 20th day of September, A. D. 1880, the following among other proceedings were had, to wit:

OSCAR A. BURTON
vs.
THE TOWN OF KOSHKONONG.

Be it remembered that heretofore, to wit, on the 12th day of May, A. D. 1880, came the above-named plaintiff, by Sleeper and Whiton, his attorneys, and filed his præcipe for a summons herein, in the words and figures following, to wit:

Præcipe.

Western district of the State of Wisconsin. To June term, A. D. 1880.

O. A. BURTON, PLAINTIFF,
vs.
THE TOWN OF KOSHKONONG, DEFENDANT.

3 The clerk of said court will issue a summons in the above cause directed to the marshal of said district for a money demand, as specified in the 4th clause or subdivision of the complaint herewith filed, returnable at the June term of said court, A. D. 1880.

SLEEPER AND WHITON,
Plaintiff's Attorneys.

To the CLERK.

May 12th, 1880.

(Endorsed:) Filed May 12, 1880. F. M. Stewart, clerk.

And at the same time said plaintiff filed his bond for costs, in words and figures as follows, to wit:

Bond for costs.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

Circuit court. To June term, A. D. 1880.

O. A. BURTON, PLAINTIFF,
vs.
THE TOWN OF KOSHKONONG, DEFENDANT. } In law.

We enter ourselves security for costs in this cause and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court; and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, we
4 hereby agree and stipulate that execution may issue against our property for any costs taxed against him.

Dated this 12th day of May, A. D. 1880.

SLEEPER AND WHITON.

(Endorsed:) Filed May 12, 1880. F. M. Stewart, clerk.

And also said plaintiff, by his said attorneys, filed his complaint herein on said day, as follows, to wit:

Complaint.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

In the circuit court for the western district of Wisconsin. To June term, A. D. 1880.

O. A. BURTON, PLAINTIFF,
against
THE TOWN OF KOSHKONONG, DEFENDANT.

O. A. Burton, who is a citizen of the State of Vermont, plaintiff, by

Sleeper and Whiton, his attorneys, complains of the town of Koshkonong, a corporation organized under the laws of the State of Wisconsin and within the purview of the laws of the United States relating to jurisdiction, a citizen of the State of Wisconsin, defendant, and shows as follows:

I.

That the defendant, on the 1st day of January, A. D. 1857, made and for a good and valuable consideration delivered to the Chicago, St. Paul and Fond du Lac Railroad Company its two certain negotiable securities for the payment of money, with interest coupons attached, and numbered 22 and 23, and the following is a copy of that numbered 22 and of the interest coupons attached thereto:

No. 22.] UNITED STATES OF AMERICA. [$1,00

STATE OF WISCONSIN.

Town of Koshkonong.

Know all men by these presents that the town of Koshkonong is indebted and promises to pay to the Chicago, St. Paul and Fond du Lac Railroad Company, or its assigns, the sum of one thousand dollars, on the first day of January, A. D. 1877, at the American Exchange Bank, in the city of New York, with interest at the rate of eight per cent. per annum, payable semi-annually, on the presentation of the annexed interest warrants at said bank on the first day of each July and January ensuing the date hereof until the said principal sum shall be paid. The holder of this bond may at any time hereafter surrender it, with unpaid coupons, and shall receive in exchange for it from said town of Koshkonong, or its proper officers, one thousand dollars of the stock of said Chicago, St. Paul and Fond du Lac Railroad Company, paid to
6 said town for it, less only any dividends previously declared or earned on said stock.

In testimony whereof, and pursuant to a vote of the qualified voters of said town, and an order of the board of supervisors of the town of Koshkonong passed at a meeting heretofore duly ratified and holden for that purpose, and pursuant to an act of the legislature of the State of Wisconsin entitled "An act to authorize certain towns to aid in the construction of the Chicago, St. Paul and Fond du Lac Railroad," approved March 31, 1856, this bond is issued, signed by the chairman of supervisors, and countersigned by the clerk of said town.

Dated at Koshkonong, January 1, A. D. 1857.

(Signed) E. P. MAY,
Chairman of Supervisors.

Countersigned by
S. R. CROSBY, *Clerk.*

(Written across the face in red ink on folio 5:) For value received, the Chicago, St. Paul and Fond du Lac Railroad Company does hereby assign the within bond to O. A. Burton, and guarantees the payment of the principal and interest thereof by the town of Koshkonong.

In testimony whereof the said company have caused the signature of their president to be hereto affixed this 16th day of November, A. D. 1857.

[SEAL.] (S'gned) W. B. OGDEN, *President.*

Coupons.

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1877, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
No. 40. $40. (Signed) S. R. CROSBY, *Clerk.*

The townof Koshkonong will pay to the holder hereof, on the first day of July, 1876, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 39. (Signed) S. R. CROSBY, *Clerk.*

7 The town of Koshkonong will pay to the holder hereof, on the first day of January, 1876, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 38. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1875, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 37. (Signed) S. R. CBOSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1875, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 36. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1874, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 35. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1874, at the American Exchange Bank, in the
8 city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 34. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1873, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 33. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1873, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 32. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1872, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 31. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1872, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of
9 said town No. 22, due on that day.
$40. No. 30. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1871, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 29. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1871, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 28. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1870, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 27. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1870, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 26. (Signed) S. R. CROSBY, *Clerk.*

10 The town of Koshkonong will pay to the holder hereof, on the first day of July, 1869, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 25. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1869, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 24. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1868, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 23. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1868, at the American Exchange Bank, in the city of

New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 22. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1867, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond
11 of said town No. 22, due on that day.
$40. No. 21. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1867, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 20. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1866, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 19. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1866, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 18. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1865, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 17. (Signed) S. R. CROSBY, *Clerk.*

12 The town of Koshkonong will pay to the holder hereof, on the first day of January, 1865, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 16. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1864, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 15. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1864, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 14. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1863, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 13. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the
13 first day of January, 1863, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 12. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1862, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 11. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1862, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 10. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1861, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 9. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1861, at the American Exchange Bank, in the
14 city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 8. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1860, at the American Exchange Bank, in the city of New York, forty dollars, being for half yearly interest on the bond of said town No. 22, due on that day.
$40. No. 7. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1860, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 6. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1859, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 5. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day January, 1859, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 4. (Signed) S. R. CROSBY, *Clerk.*

15 The town of Koshkonong will pay to the holder hereof, on the first day of July, 1858, at the American Exchange Bank, in the

city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 3. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of January, 1858, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No 22, due on that day.
$40. No. 2. (Signed) S. R. CROSBY, *Clerk.*

The town of Koshkonong will pay to the holder hereof, on the first day of July, 1857, at the American Exchange Bank, in the city of New York, forty dollars, being for half-yearly interest on the bond of said town No. 22, due on that day.
$40. No. 1. (Signed) S. R. CROSBY, *Clerk.*

II.

And the plaintiff shows that said negotiable security number 23, and the coupons thereto attached, were of the same tenor and form and for the payment of the same sums mentioned to be paid in said bond numbered 22, and the coupons thereto attached, except that the number of such bond was mentioned therein, and in the coupons annexed thereto, as 23 instead of 23.

16 III.

The plaintiff also further shows that on the 16th day of November, A. D. 1857, both the said negotiable securities numbered twenty-two and twenty-three were, together with the coupons thereto attached, for a valuable consideration, duly sold, assigned, and endorsed over to the plaintiff, who has ever since been the lawful owner and holder thereof; and that no part of the sums mentioned to be paid in the said two negotiable securities numbered 22 and 23, or in the said coupons thereto attached, has ever been paid, except the first two coupons of forty dollars each, which fell due on each of said two negotiable securities at July 1, 1857, and January 1, 1858, respectively.

IV.

And the plaintiff further shows that there is now due him from the defendant upon the said two negotiable securities, and the unpaid coupons thereto attached, the sum of two thousand dollars, and interest thereon at eight per cent. from January 1st, A. D. 1877; also upon the unpaid coupons attached to the said bonds the further sums following, viz: Eighty dollars, and interest thereon at 7 per cent. from July 1, 1858; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1859; eighty dollars, and interest thereon at 7 per cent. from July 1, 1859; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1860; eighty dollars, and interest thereon at 7 per cent. from July 1, 1860; eighty dollars, and interest thereon at 7 per cent. from Jan'y
17 1, 1861; eighty dollars, and interest thereon at 7 per cent. from July 1, 1861; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1862; eighty dollars, and interest thereon at 7 per cent. from July 1, 1862; eighty dollars, and interest thereon at 7 per cent.

from Jan'y 1, 1863; eighty dollars, and interest thereon at 7 per cent. from July 1, 1863; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1864; eighty dollars, and interest thereon at 7 per cent. from July 1, 1864; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1865; eighty dollars, and interest thereon at 7 per cent. from July 1, 1865; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1866; eighty dollars, and interest thereon at 7 per cent. from July 1, 1866; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1867; eighty dollars, and interest thereon at 7 per cent. from July 1, 1867; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1868; eighty dollars, and interest thereon at 7 per cent. from July 1, 1868; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1869; eighty dollars, and interest thereon at 7 per cent. from July 1, 1869; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1870; eighty dollars, and interest thereon at 7 per cent. from July 1, 1870; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1871; eighty dollars, and interest thereon at 7 per cent. from July 1, 1871; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1872; eighty dollars, and interest thereon at 7 per cent. from July 1, 1872; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1873; eighty dollars, and interest thereon at 7 per
18 cent. from July 1, 1873; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1874; eighty dollars, and interest thereon at 7 per cent. from July 1, 1874; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1875; eighty dollars, and interest thereon at 7 per cent. from July 1, 1875; eighty dollars, and interest thereon at 7 per cent. from Jan'y 1, 1876; eighty dollars, and interest thereon at 7 per cent. from July 1, 1876; eighty dollars, and interest thereon at 7 per cent. from January 1, 1877; and the plaintiff demands judgment for the aggregate of the sums so due him as aforesaid from the defendant, and the costs of this suit.

SLEEPER AND WHITON,
Pl'ff's Att'ys.

Whereupon a summons issued in the words and figures following, to wit:

Summons.

Circuit court of the United States for the western district of Wisconsin.

O. A. BURTON
vs.
THE TOWN OF KOSHKONONG.

The President of the United States of America to the said defendant:

You are hereby summoned to appear within twenty days after the service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid; and in case of
19 your failure so to do, judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served on you. And you are also required to file your answer in said action in the office of the clerk of this court, at the city of Madison, within the time above specified.

The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Madison, in the said western district of Wisconsin, this 12th day of May, in the year of our Lord one thousand eight hundred and eighty, and of the Independence of the United States the one hundred and fourth.

[L. S.] F. M. STEWART, *Clerk.*
By THOMAS H. GILL,
Dep'y Clerk.

SLEEPER AND WHITON,
Plaintiff's Attorneys.
P. O. address: Chicago, Ill's.

Which said summons was duly handed to the marshal of said district, and by him duly served, as by his endorsement appears, as follows, to wit:

Return.

Served on the within-named the Town of Koshkonong, by delivering to Geo. A. Jenkins, chairman of the board of supervisors of said town, and H. Justus Williams, town clerk of said town, each personally, a copy of this summons and complaint this 15th day of May, A. D. 1880.

20 F. W. OAKLEY, *Marshal,*
By W. S. MAIN, *Deputy.*

Fees: Service, 4.00; copies, 8.00; tr. ex., 4.90—$16.90.

And afterwards, to wit, on the 1st day of June, A. D. 1880, came the said defendant, by its attorneys, L. B. and C. A. Caswell, and filed its answer herein, as follows, viz:

Answer.

UNITED STATES OF AMERICA,
Western District of Wisconsin:

In circuit court for the western district of Wisconsin.

O. A. BURTON, PLAINTIFF,
ag'st.
THE TOWN OF KOSHKONONG, DEFENDANT.

The above-named defendant appears in this action, by L. B. and C. A. Caswell, its attorneys, and for answer to the complaint alleges:

First. That the instruments in writing of one thousand dollars each, described in the complaint as negotiable securities No. 22 and 23, are not "bonds" or sealed instruments within the meaning of the act of the legislature of the State of Wisconsin approved March 31st, 1856, and referred to in said instruments as authority for issuing the same, nor was the issue of such instruments authorized by the election
21 which was held in said town, but they were issued without any authority or otherwise, and are consequently void and of no validity.

Second. For a further answer to the complaint the defendant alleges that, as to all the coupons attached to both of said instruments or secu-

rities number 22 & 23, described and set forth in the complaint as coupons numbered from three to thirty-four, both inclusive, to wit, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, & 34, on each of said instruments, making sixty-four coupons in all, of $40 each, and each and every one the defendant saith, the said several causes of action did not accrue thereon within the six years next prior to the commencement of this action, and the said coupons and the instruments to which they are attached are simple contracts not under seal, and that action on the said sixty-four coupons are, and each of them is, barred by the statute of limitations of the State of Wisconsin.

The defendant therefore prays judgment and for costs.

L. B. AND C. A. CASWELL,
Att'ys for Def't, Fort Atkinson, Wis.

(Endorsed:) Filed June 1, 1880. F. M. Stewart, clerk.

And afterwards, to wit, on the fifth day of August, A. D. 1880, came the respective parties hereto, by their attorneys, and filed the following stipulation waiving a jury in said cause, to wit:

Stipulation waiving jury.

22 Circuit court U. S. western district of Wis.

O. A. BURTON
vs.
THE TOWN OF KOSHKONONG.

It is hereby stipulated that the issues in this case be, and they are hereby, submitted to the court for trial without the intervention of a jury, a jury being hereby waived.

August 5, 1880.

SLEEPER & WHITON,
Pl'ff's Att'ys.
L. B. AND C. A. CASWELL,
Att'ys for Def't.

And on the same day, to wit, the 5th day of August, A. D. 1880, being the 48th day of said term, in the record of proceedings in said entitled cause appears the following entry, to wit:

Hearing.

O. A. BURTON, PLAINTIFF,
vs.
THE TOWN OF KOSHKONONG, DEFENDANT.

This day came the parties, by their attorneys, and this cause is argued and submitted, and the same taken under advisement.

And thereafter, upon the said 20th day of September, A. D. 1880, being the said 64th day of said term, in the record aforesaid ap-
23 pears the following finding, to wit:

Finding.

Circuit court United States western district of Wisconsin.

O. A. BURTON
vs.
THE TOWN OF KOSHKONONG.

This cause was submitted to the court, by stipulation in writing, signed by the attorneys for the respective parties and filed in the cause, and a trial by jury waived, pursuant to the statute in such case made and provided, and thereupon the court, after hearing the proofs and allegations of the respective parties, and the arguments of counsel, finds as matter of fact:

I.

That the defendant made the two bonds or instruments in writing described in the complaint in this case, and coupons or interest warrants annexed to them, as alleged in the complaint, and delivered the same to the Chicago, St. Paul and Fond du Lac Railroad Company, as also alleged in said complaint.

II.

That the said Chicago, St. Paul and Fond du Lac Railroad Company, for a valuable consideration paid to it by the plaintiff, by assignment in writing, endorsed on the said bonds or instruments in writing, sold, assigned, and endorsed the said instruments, and the coupons to each annexed, to the plaintiff, and then and there delivered them
24 to him, and he then and there became and was the legal owner and holder thereof, and so continued until the commencement of this suit, as alleged in the complaint.

III

That no part of the principal money mentioned in either of said instruments, nor of the moneys mentioned in the thirty-eight coupons or interest warrants attached to each of said bonds or instruments in writing and set forth in said complaint, nor of any interest, or any of said several sums of money, has ever been paid; but the same remains due and unpaid from the defendant to the plaintiff, and in the whole amount on the day of filing this finding, to the amount of eight thousand four hundred dollars.

IV.

And as matter of law, the said court finds that the plaintiff is entitled to recover from the defendant said sums of one thousand dollars mentioned in said two bonds or instruments in writing, amounting to two thousand dollars; and the said several sums of money mentioned in the said seventy-six coupons or interest warrants attached to said two bonds or instruments in writing, the same being the interest unpaid upon the said sums of one thousand dollars mentioned in said instrument in writing; and he is also entitled to recover interest at the rate of eight per centum per annum, on each of said sums of one thousand dollars, from the first day of January, A. D. 1877, and interest on the said

sum of forty dollars mentioned in each of said coupons or interest warrants at the rate of seven per centum per annum, from the time each of said sums, by the terms of said bonds or instruments in writing and said coupons or interest warrants, became due and payable; and that the statute of limitations pleaded by the defendant has not run against or barred such recovery.

V.

It is therefore ordered that judgment be entered in favor of the plaintiff and against the defendant for the said sum of eight thousand four hundred dollars and his costs of this suit. Dated September 20th, 1880.

By the court.

R. BUNN.

Whereupon, on the same day, to wit, the 20th day of September, A. D. 1880, judgment in said cause was rendered in words and figures following, to wit:

Judgment.

UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

Circuit court of the United States for the western district of Wisconsin.

O. A. BURTON
vs.
THE TOWN OF KOSHKONONG. } No. 515, A.

This cause having heretofore been argued and submitted to the court pursuant to stipulation, and the court being sufficiently advised
26 of and concerning the same, it is hereby considered and adjudged by the court, now here, that the said plaintiff do have and recover of the said defendant, the Town of Koshkonong, the sum of eight thousand four hundred dollars damages, with fifty-six dollars and twenty cents, his costs about his said suit in this behalf by him expended.

Damages, $8,400.00; costs, 56.20.—$8,456.20.

Judgment-roll signed September 20, A. D. 1880.

F. M. STEWART, *Clerk.*

And, on the rendition of the judgment aforesaid, the following opinion of the court was pronounced and filed, viz:

Opinion.

United States circuit court western district of Wisconsin.

O. A. BURTON
vs.
THE TOWN OF KOSHKONONG. } Trial by the court.

BUNN, J.: This action came on for trial at the present term before the court, a jury having been waived by stipulation. The action is upon two railroad bonds for one thousand dollars each, dated January 1, 1857

issued by the defendant town to the Chicago, St. Paul and Fond du Lac Railroad Company, payable in twenty years, with 8% interest semi-annually until the principal is paid. Coupons for the semi-an-
27 nual interest are attached to the bond, the first two only of which have been paid. The defendant pleads the statute of limitations to all those coupons falling due more than six years previous to the commencement of the action. The case is submitted upon the complaint and answer, and there are two questions to be decided: First. Is the plea of the statute of limitations good? Second. Is the plaintiff entitled to recover, under the laws of Wisconsin, interest upon the interest represented by the coupons from the time of falling due?

Upon the first question, I think the suit being upon the bonds themselves, which in the body thereof provide for the payment of interest semi-annually until paid, the statute of limitations has no application to the case. The object of attaching warrants for the payment of interest as it falls due is to give commercial character and value to the bonds by enabling the holder to detach them for presentation and payment when due or to sell them as commercial paper before due, or if not paid when due to enable the holder thereof to bring a separate action to recover the amount represented by them. It is a mere matter of commercial convenience. They are part and parcel of the bond itself until detached therefrom or separate suit brought upon them. If relied upon as an independent cause of action, and a separate suit is brought upon them, undoubtedly the six years' statute of limitations might be pleaded. Amy vs. Dubuque, 98 U. S., 470. But the holder is not compelled
28 to bring a separate suit upon the coupon, but it is optional with him to do so or wait until his bond falls due, as in this case, and then sue for principal and interest, basing his action upon the bond and not upon the coupons, or upon the bonds and coupons as constituting one entire cause of action. It seems to me this holding is entirely consistent with the case of Amy vs. Dubuque above referred to, and Clark vs. Iowa City, 20 Wall., 583. Suppose no coupons had been executed and the bond had provided, as this now does, for the payment of interest semi-annually, the rule would be just the same. An action might be maintained every six months to recover the interest if not paid. But no one would suppose it to be necessary to bring such action in order to prevent the statute from running upon the interest, or that it would not be optional with the holder to wait until the bond fell due and recover principal and interest for the entire time. If there were no provision in the body of the bond itself for the payment of semi-annual interest, and the plaintiff had to rely upon the coupons, the case would be different.

The other question, I think upon careful consideration, must also be resolved in favor of the plaintiff. The question, like that of the statute of limitations, is one of local law. See Amy vs. Dubuque, 98 U. S., 470; Cromwell vs. County of Sac, 96 U. S., 51. The supreme court of Wisconsin, in Mills vs. Jefferson, 20 Wis., 50, gave a construction to the interest law theretofore in force, and at the time of the issuing of those bonds in force, in that State. By that decision these coupons draw in-
29 terest at the legal rate of seven per cent. from the time due, not because coupons for the interest were given, but on the ground that the interest being due and not paid it draws interest like any other debt that is overdue, when no interest is expressly stipulated. This decision was made in 1865.

It may be that the weight of authority upon this question generally is the other way. Certain it is, the authorities are divided. But such

was the law of this State when these bonds were made and until chapter 60, sess. laws of 1858, was enacted. It is claimed that this statute has changed the rule even as to contracts existing at the time of its passage. Section 1 is as follows:

"It was and is the true intent and meaning of sections one and two, of chapter 160, of the general laws passed in the year 1859, and of all other laws heretofore enacted in this State prescribing and limiting the rate of interest, that interest should not be compounded or bear interest upon interest unless an agreement to that effect was clearly expressed in writing and signed by the party to be charged therewith."

Section 2 is as follows:

"Section two, of chapter 160, of the general laws of 1859, is hereby amended by adding thereto the following:

"And in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest."

By the Revised Statutes of 1878, the following provision takes the place of this statute:

30 "Sec. 1689. * * * And in the computation of interest upon any bond, note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest, unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith."

It should not be inferred that it was intended either of these statutes should apply to contracts already made unless such a construction be unavoidable. The legislature may enact new laws or amend old ones for the government of the people in the future, but it cannot put a construction upon laws already existing and give to such construction a retroactive effect so as to overturn a settled interpretation given by the courts, and to undertake it is simply to confound the legislative with the judicial function.

Cooley, Con. Lim., 93–'6; Reiser vs. William Tell, 39 Pa. St., 137; The People vs. Board Sup'v'rs New York, 16 N. Y., 431; Salters vs. Tobias, 3 Paige, 338.

But suppose the first section of chapter 60 be taken as evidence of an intent on the part of the legislature to make the prohibition against reckoning interest upon interest apply to past contracts. The question arises, Does the law impair the obligation of the contract, or does it merely affect the question of the measure of damages which is part of the remedy?

A judgment rendered in New York, which by the law there draws seven per cent., if sued over in Massachusetts, where the rate is
31 six per cent., only six per cent. will be allowed as damages. Berringer vs. King, 5 Gray, 9. So if a note given in New York drawing seven per cent. before, and after due is sued in Massachusetts, seven per cent. will be allowed up to the time the rate falls due as interest according to the law of the place where the contract is made, and six per cent. after due, as the measure of damages in Massachusetts.

So in other States interest is recovered upon a contract after due, not as interest by force of the contract, but as damages.

But whatever the rule may be elsewhere, it has always been in Wisconsin that interest is recoverable upon a contract providing for interest until due at the same rate after as before due on the ground of an implied contract, and that such is the implied agreement and understanding of the parties. See Spencer vs. Moxfield, 16 Wis., 178. If interest after due is recoverable upon the ground of an implied contract,

then such implied contract comes as surely within the protection of the constitutional provision as though the contract were express.

During the first eleven years of the life of these bonds, to wit, from 1857 to 1868, the undoubted law of the State was that interest should be recovered upon the coupons overdue, so that if this suit could have been brought in 1868, before the passage of this statute, the plaintiff must have recovered according to that law. Now, suppose we say that the statute affects the remedy merely, does it not affect it in so
32 substantial a manner as to be equivalent to an impairment of the contract.

I think it must be conceded that it cuts off a material portion of his cause of action, and it makes a difference of between one and two thousand dollars, whether interest be reckoned according to the law in force when the contract was made or that in force when the trial is had.

The distinction between impairing the obligation of the contract and changing the remedy is very misleading unless its operation be confined, where it belongs, within very narrow limits. I take it that any change in the remedy which practically cuts off a portion of the cause of action or renders the contract of less available worth is as much within the constitutional prohibition as a law which strikes directly at the contract itself. Otherwise it would always be in the power of a State legislature to practically nullify this great constitutional guarantee. The remedy existing at the time the contract is made, as entering into the contemplation of the parties at that time, is part of the obligation of the contract, and it should be no more in the power of the legislature to impair that in such a way as to render the contract of less value than it is to impair the contract itself. See Edwards vs. Keaszey, 96 U. S., 595.

But I think the statute if made to apply to past contracts clearly impairs the obligation of the contract itself.

But, as I said, a construction making these statutes apply to contracts made before their passage should not be adopted unless
33 necessary, and whatever may be said of chap. 60, laws of 1868, it is no longer in force, having been repealed by the Revised Statutes of 1878, which substitutes the other provision above referred to in its place. And as to this last provision, which is now in force, though the language is general enough to apply to all contracts, if such a construction would not render the law unconstitutional, it should, I think, in view of this consideration if no other, be held to apply only to contracts executed after its passage, and such I hold to be the proper construction.

The plaintiff will be entitled to judgment for the principal of the two bonds and the amount named in the unpaid coupons thereto attached, with interest at eight per cent. upon the principal from January 1, 1877, the time the bonds fell due, and with interest at seven per cent. upon the unpaid coupons from the time they severally fell due.

34 WESTERN DISTRICT OF WISCONSIN, *ss:*

I, F. M. Stewart, clerk of the circuit court of the United States for the western district of Wisconsin, do hereby certify that I have compared the above and foregoing writings annexed hereto with the originals now remaining of record and on file in my office, and that they are true copies of their respective originals and of the whole thereof, and correct transcripts therefrom, and that attached hereto is the original writ of error, copy of bond or writ of error, assignment of errors, and citation.

In testimony whereof, I have hereunto set my hand and duly affixed

the seal of the said circuit court, at my office in the city of Madison, in said western district of Wisconsin, this 30th day of March, A. D. 1881, and of our Independence the one hundred and fifth year.

[SEAL.] F. M. STEWART,
Clerk Circuit Court West'n Dist.

35 Supreme Court of the United States. Of the October term, in the year of our Lord one thousand eight hundred and eighty-one.

THE TOWN OF KOSHKONONG, PLAINTIFF IN error,
vs.
O. A. BURTON, DEFENDANT IN ERROR.

And afterwards, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, comes the said the Town of Koshkonong, by L. B. and C. A. Caswell, its attorneys, and says that in the record and proceedings aforesaid there appears and is manifest error in this, to wit:

First. That it appears by the record aforesaid that the said circuit court found that the defendant made or was bound or obligated by the instruments in writing described in the complaint, or the coupons attached thereto.

Second. That it appears by the record aforesaid that the said circuit court found that the plaintiff was entitled to recover from the defendant upon the said bonds or instruments of one thousand dollars each, and upon the coupons attached thereto.

Third. That it further appears by the record aforesaid that the said circuit court found that the plaintiff was entitled to recover interest upon the said sums of forty dollars mentioned in each of the said coupons after they became due and payable.

36 Fourth. That it further appears by the record aforesaid; that the said circuit court found that the statute of limitations pleaded by the defendant did not run against and bar a recovery on the interest coupons mentioned in the complaint, attached to each of said instruments in writing numbered from three to thirty-four, both inclusive, making sixty-four in all, and upon each and every one of them, the same being the coupons or interest warrants which had been past due more than six years prior to the commencement of this action, and that the plaintiff was entitled to judgment thereon.

Fifth. That it further appears by the record aforesaid that the said circuit court ordered and rendered judgment in favor of the plaintiff and against the defendant.

Sixth. That it further appears that the said circuit court erred in other matters not herein specifically referred to.

And the said the Town of Koshkonong prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that it may be restored to all things which it hath lost by occasion of the said judgment.

L. D. & C. A. CASWELL,
Attorneys for Plaintiff in Error.

37 *Bond on writ of error.*

Know all men by these presents, that we, Milo Jones and Joseph D. Clapp, are held and firmly bound unto A. O. Burton in the full and just sum of five hundred dollars, to be paid to the said A. O. Burton or his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents, sealed with our seals and dated this third day of January, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas lately at a term of the circuit court of the United States in and for the western district of Wisconsin, in a suit depending in said court between A. O. Burton, plaintiff, and the Town of Koshkonong, defendant, judgment was rendered against the defendant, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said A. O. Burton, citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington, the second Monday of October next:

Now the condition of the above obligation is such that if the said Town of Koshkonong, defendant, shall prosecute said writ of error to effect, and answer all costs, if it fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

MILO JONES. [L. S.]
JOSEPH D. CLAPP. [L. S.]

Sealed and delivered in presence of—
C. A. CASWELL.

38 Approved by R. BUNN, *Dist. Judge.*

STATE OF WISCONSIN,
Jefferson County, ss:

Milo Jones and Joseph D. Clapp, the above named obligors, being duly sworn, say, each for himself, that he is a householder, freeholder, and resident of the county and State aforesaid, and is worth the sum of three thousand dollars over and above all debts, liabilities, and exemptions.

MILO JONES.
JOSEPH D. CLAPP.

Subscribed and sworn to before me this 3d day of January, 1881.
[NOTARIAL SEAL.] C. A. CASWELL,
Notary Public, Jefferson Co., Wis.

39 The United States of America to Oscar A. Burton, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the United States for the western district of Wisconsin, wherein the Town of Koshkonong is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Su-

preme Court of the United States, this twenty-fourth day of March, in the year of our Lord one thousand eight hundred and eighty-one.

R. BUNN,
District Judge, West'n Dist. Wis.

40 We hereby accept due service of the within and foregoing citation on us, and do hereby enter our appearance for the defendant in error, this 4th day of April, A. D. 1881.

SLEEPER, WHITON & BROWN,
Attorneys for Defendant in Error.

(Indorsement on cover:) No. 827. The Town of Koshkonong, plaintiff in error, vs. Oscar A. Burton. W. Wisconsin C. C. U. S. Filed 18th April, 1881.

OFFICE SUPREME COURT U. S.
FILED
DEC 10 1881

U. S. Supreme Court.

NO. 827.

THE TOWN OF KOSHKONONG,
Plaintiff in Error,

vs.

O. A. BURTON, Defendant in Error.

BRIEF AND ARGUMENT

For Plaintiff in error.

L. B. CASWELL,
Of Counsel.

Fort Atkinson, Wis.:
JEFFERSON CO. UNION STEAM PRESSES, MILWAUKEE STREET.
1881

United States Supreme Court.

THE TOWN OF KOSHKONONG,
Plaintiff in error,

Against

O. A. BURTON,
Defendant in error.

Brief and Argument for Plaintiff in Error.

A writ of error to the Circuit Court for the Western District of Wisconsin, to reverse a judgment for plaintiff in an action upon bonds and coupons.

Statement of the Case.

The complaint alleges that the plaintiff in error issued, and defendant in error, is the owner and holder of two Bonds of $1.000 each, dated January 1st, 1857, payable in twenty years from date, at the American Exchange Bank in the city of New York, with interest at the rate of eight per cent. per annum, payable semi-annually, on presentation of the annexed interest warrants, at said Bank, on the first day of each July and January, ensuing. A copy of the bonds is set forth, and of the interest warrants

attached, consisting of thirty-eight coupons of $40 each, on each of said bonds, making seventy-six in all; claiming that no part of the bonds or coupons had been paid, except the first two coupons on each bond.

"And the plaintiff further shows, that there is now due him, from the defendant upon the two negotiable securities, and the unpaid coupons, thereto attached, the sum of two thousand dollars and interest thereon, at eight per cent., from January 1st, 1877, also upon the unpaid coupons attached to the said bonds, the further sums, following, viz.: Eighty dollars and interest thereon, at 7 per cent: from July 1st, 1858. Eighty dollars and interest thereon, at 7 per cent. from January 1st, 1859," and so on down to, and including the coupons falling due January 1st, 1877, the date of maturity of the principal, "and the plaintiff demands judgment for the aggregate of the sums due him as aforesaid from the defendant."

The instruments are not under seal. Sixty-four of the coupons were past due more than six years when the action was commenced.

The defendant answered, that the enabling act of the Legislature of Wisconsin authorized the town to issue bonds or sealed instruments and no other, and for that reason, these unsealed instruments were void.

The answer also set up the statute of limitations, as to the sixty-four coupons over due six years, when the action was brought.

The case was tried before the Court, a jury being waived.

The Court found, as a matter of law, "That the plaintiff is entitled to recover from the defendant, the said sums of one thousand dollars, mentioned in the said two bonds, or instruments in writing, amounting to two thousand dollars,

and the said several sums of money mentioned in the said seventy-six coupons or interest warrants, attached to said bonds or instruments in writing."

"And he is also entitled to recover the interest at the rate of eight per cent. per annum. on each of said bonds of one thousand dollars, from the first day of January, 1877, and interest on the said sums of forty dollars mentioned in each of said coupons or interest warrants, at the rate of seven per cent. per annum, from the time each of said sums by the terms of said bonds or instruments in writing, and said coupons or interest warrants, became due and payable, and that the statute of limitations pleaded by the defendant, has not run against, or barred such recovery.

On the 20th day of September, 1880, judgment was rendered against the plaintiff in error, for $8.400, the amount of the principal and coupons with interest according to said finding.

The plaintiff assigns the following errors:

FIRST. The Court erred in finding that the defendant was bound or obligated by the instruments in writing discribed in the complaint, or the coupons attached thereto.

SECOND. The Court erred in finding that the plaintiff was entitled to recover from the defendant upon said bonds and coupons.

THIRD. The Court erred in finding that the plaintiff was entitled to recover interest upon the said sums of forty dollars mentioned in each of the said coupons, after they became due and payable.

FOURTH. The Court erred in finding that the statute of limitations, pleaded by the defendant, did not run against and bar a recovery upon the interest coupons mentioned in the complaint attached to each of the instruments in

writing, numbered from three to thirty-four, both inclusive, making sixty-four in all, and upon each and every one of them, the same being the coupons or interest warrants which had been past due more than six years prior to the commencement of this action, and that the plaintiff was entitled to recover thereon.

FIFTH. Because the Court rendered judgment in favor of the plaintiff and against the defendant.

SIXTH. The Court erred in other matters not herein specifically referred to.

Points of Law and Argument.

I

The only authority for issuing the instruments in suit, is found in chapter 368, Private Laws of the Legislature of Wisconsin in 1856. This act provides that the defendant town, with others, may "issue the *bonds* of the respective towns, for any sum of money, not exceeding the amount of sixty thousand dollars."

A bond is an instrument under seal, and by such instrument only, could the town be obligated. *Baxter vs State.* 15 *Wis.* 488. *Chap.* 7, *Angel & Ames on Cor* 187, *Ibid* 300, *Sec.* 295. *Bouviers Dic.* 200. *and cases cited. Harman vs. Harman*, 1*st Baldwin* (*U. S. C.*) 129. 1 *Black* (*Ind.*) 241. *Hubbard vs. Town of Lindon.* 28 *Wis.* 674.

The rule is somewhat relaxed in the regular course of business of a corporation. Issuing bonds by a municipal corporation, like a town, is a transaction, entirely extraneous from the objects for which the corporation was created. Common law powers are wanting. 2. *Kent Com.* 291, *Angel & Ames.* 217. *Kinzie vs. Chicago*, 2 *Scam* (*Ill.*) 188. *Head vs, Ins. Co,*, 2 *Crouch* 127.

Koebler vs. Black River Falls Insurance Co.. 1 *Black*, 715. *Irwin vs. Loury*, 14 *Peters* 293, 15 *Peters* 290.

The clause in Section 2, of the enabling act, directing that "such bonds shall be signed by the chairman of Supervisors, and countersigned by the Clerk," only determines who, of the town officers, shall sign the instruments. It does not authorize the omission of the corporate seal.

II

If, however, these instruments are binding, then we say action upon the sixty-four coupons which were past due six years, when this suit was instituted, was barred by the statute of limitations.

For more than forty years, the statutes of Wisconsin have barred recovery upon contracts, not under seal, where the cause of action had accrued six years before the commencement of the action.

Sec. 15, *Page* 26 *Ter. Stat.* 1839, provides, "all actions of debt, founded upon any contract or liability, not under seal," shall be commenced within six years, next, "after the cause of action shall accrue, and not afterwards." The *Revised Statutes of* 1849, *Sec.* 14, *page* 643, continues the same provision, and it was while this statute was in force, that these instruments were issued. *Revised Statutes* 1858, *page* 221, retains substantially, the same provision, varied slightly in language. But the Legislature of 1861, *Chap.* 282, *page* 302, *Session Laws*, restores the exact language of the statute of 1849. This clause has been retained, and in 1872, the Legislature added the following: *Chap.* 53, *Laws* 1872, *approved March* 9, "No action brought to recover any sum of money, on any bond, coupon, interest warrant, agreement or promise in writing, made or issued by any town, county, city or village, or upon any installment

of the principal or interest thereof shall be maintained in any court, unless such action shall be commenced within six years from the time when such sum of money has, or, shall become due, when the same has been, or shall be, made payable to bearer, or to some person or bearer, or to the order of some person, or to some person or his order; *Provided*, that any such action may be brought within one year after this act shall take effect."

The *Revised Statutes of* 1878, *page* 1016, condenses the foregoing provision, to the following: "An action upon any bond, coupon, interest warrant, or other contract for the payment of money, whether sealed or otherwise, made or issued by any town, county, city, village or school district, in this State."

"Any action upon any other contract, obligation or liability, express or implied," to be brought within six years, &c.

These provisions were in force when this action was brought, and the act of March 9th, 1872, above quoted, which bars recovery on bonds or coupons which have been due six years, had been in force over eight years when this action was commenced. If the subject of limitation is within the control of the Legislature, we can not see how its reasonable provisions, upon that subject, can be disregarded.

No question is made, but that the principal of these instruments comes within the six years' limitation of the statute referred to which has been in force since the Territorial acts of 1839, and the only question, is whether coupons come within that limitation also, when they have been due six years.

This action was brought upon two bonds and thirty-eight coupons attached to each.

The complaint claims judgment for the principal, and interest on the principal, not from the time the bonds were executed, but from the first day of January, 1877, the day they become due.

The complaint, also claims judgement, not for the interest accruing upon the bonds, from the time they were given until due, but upon the seventy-six coupons attached to the bonds, and copied into the complaint. and interest on each coupon, at 7 per cent. after it fell due.

The plaintiff, as well as the Court, so far treated these coupons to be separate contracts from the bonds, as to give to them the quality of drawing interest from the time they fell due.

To this proposition, we do not object. But, we say that an obligation which will take with it interest after due, not by reason of special contract, but because it is due and unpaid, is such an instrument as comes within, and is subject to the statute of limitations.

In Aurora City vs. West, 7 *Wal., on page* 105, Mr. Justice Clifford remarks: "Bonds and coupons like these, by universal usage and consent, have all the qualities of commercial paper. Coupons are written contracts for the payment of a definite sum of money, on a given day, and being drawn and executed in a form, and made for the very purpose that they may be separated from the bonds, it is held that they are negotiable, and that a suit may be maintained without the necessity of producing the bonds to which they were attached." * * "Being written contracts for the payment of money, and negotiable because payable to bearer, and passing from hand to hand as other negotiable instruments, it is quite apparent, on general principles, that they should draw interest after payment

of the principal is unjustly neglected or refused." See also, *Kenosha vs. Lamon* 9, *Wal.* 477. *Lexington vs. Butler* 14, *Wal.* 282.

In *Clark vs. Iowa City* 20, *Wal.* 583, and in *Amy vs. Dubuque* 8, *Otto* 470, coupons were recognized as contracts, and causes of action subject to the statute of limitations, notwithstanding the bonds, to which they were, or had been attached were not due; and I am at a loss to see why the case last cited, is not decisive of this.

In *Kenosha vs. Lamon*, *Lexington vs. Butler*, and *Clark vs. Iowa City*, the principal point contended for, was that it would take the same number of years to bar a cause of action upon a coupon after it became due, as it would to bar an action upon the bond from which the coupon was taken.

No one pretending that a coupon falling due soon after a twenty year bond was executed, would not be barred until action was barred upon the face of the bond.

In Clark vs. Iowa City, Mr. Justice Field used this language:

"All statutes of limitation begin to run when the right of action is complete, and it would be exceptional and illogical to hold that the statute sleeps with respect to claims upon detached coupons, whilst a complete right of action upon such claims, exists in the holder."

The case of *Amy vs. Dubuque* 8, *Otto* 470, applied the same doctrine to coupons when attached to the bond, and we are unable to distinguish that case from the one at bar.

Aside from the general statute just under consideration, we insist that chapter 53, of the laws of 1872, in force eight and one-half years before the commencement of this action, was a complete bar to a recovery upon these coupons, as it

would be a bar to a recovery upon any installments of interest which might have accrued upon these bonds, if coupons had not bee

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ors, 43 *Wis.* 129.

The statute of li

Brown vs. Bicknell, 1 *Pinney.* (*Wis.*) 226. *Pritchard vs. Howell*, 1 *Wis.* 131.

It is immaterial whether the contract out of which the cause of action springs, existed when the statute was enacted or not.

It is more material whether the cause of action had then accrued, and if it had, did the statute give a reasonable time in which to bring an action? Or did a reasonable time elapse before suit was brought?

The statute should operate against all causes of action accruing after the passage of the act, and should be effectual as to all causes then existing after the full period of six years intervened, and especially, in this case, when over eight years had elapsed before the action was brought.

By that statute, sixty-four of the coupons set out in the complaint were barred when this action was instituted, and the act includes installments of interest as well as coupons.

In Baker vs. Supervisors, 39 *Wis., page* 448, the Court

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would be a bar to a recovery upon any installments of interest which might have accrued upon these bonds, if coupons had not been used.

If it be said this statute could not effect contracts already made, we answer that this act gave one year after its passage in which to bring suit upon causes of action then accrued.

Similar statutes have been repeatedly upheld by the Supreme Court of Wisconsin.

Parker vs. Kane, 4 *Wis.* 1. *Smith vs. Packard*, 12 *Wis.* 371. *Howell vs. Howell*, 15 *Wis.* 55. *Meklem vs. Blake*, 22 *Wis.* 495. *Baker vs. Supervisors*, 39 *Wis.* 444. *Eaton vs. Supervisors*, 40 *Wis.* 668. *Hide vs. Supervisors*, 43 *Wis.* 129.

The statute of limitations relates to the remedy.

Brown vs. Bicknell, 1 *Pinney.* (*Wis.*) 226. *Pritchard vs. Howell*, 1 *Wis.* 131.

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In Baker vs. Supervisors, 39 *Wis.*, *page* 448, the Court

say: "The law is well settled; that a right of action already accrued, may be barred, provided a reasonable time be given after the passage of the act for a party to prosecute." Could the defendant in error, be permitted to wholly disregard this statute referred to?

III

If it be conceded that action would be barred upon the sixty-four coupons, to which the statute of limitations is pleaded, but claimed that because the action includes the principal of the bonds, the statute does not operate against the coupons, then the defendant would assume this singular position, that these coupons were barred after six years, until the bonds fell due, when the bar was removed, the action revived, and in its new life suit could be brought upon the bonds, and all the coupons, though once barred, and a recovery had. This would be a resurrection without precedent, and in conflict with numerous decisions in the state of Wisconsin, which hold that actions once barred can not be revived, except by some agreement express or implied, not even by the Legislature.

Specher vs. Wakely, 11 *Wis.*, 432. *Hill vs. Kricke*, *ibid*, 442. *Lindsay vs. Fay*, 28 *Wis.*, 177. *McKinney vs. Springer*, 8 *Black R.*, 506. *Davis vs. Minor*, 1 *How. Miss*, 183.

Again, suppose the defendant in error, attempts to ignore the coupons in question, and falls back upon the body of the bonds, and claims interest during the term of years covered by the coupons, upon the theory that interest is never barred until the principal sum is also barred, in other words, that the bonds draw interest after them until paid. We answer, such is not his standing in court. The action is brought upon bonds and coupons. The complaint claims

judgment upon two bonds of one thousand dollars each, and interest thereon, *from and after January* 1st, 1877, and "upon the unpaid coupons attached to the said bonds." *See fol.* 16, *page* 8, *Printed Record.*

Not a line or syllable, in the complaint, sets forth any intention to abandon the coupons, and fall back upon the face of the bonds for the recovery of the interest during the years covered by the coupons.

If the defendant in error, ever modifies his action so as to make that claim, we will discuss with him, the right of a holder to allow coupons to slumber in his hands until they are barred by the statute of limitation, then fall back upon the bond and recover interest upon that, from its date, the same as though coupons had never been used. These separate warrants are given for the benefit and convenience of the holder. He can negotiate or use them as he pleases, and may allow them to become barred by the statute of limitations if he pleases. They have qualities not given to mere installments of interest accruing upon a bond. The holder may enforce payment upon them, but he must do it within the life fixed by the statute. When once put in the form of negotiable paper separate from the bond, like separate negotiable notes for installments of interest accruing upon a mortgage, taking the form of a separate cause of action, which will draw interest after due, the holder submits then to the operations of the statute, and if they become barred, the interest which such coupons represent, is also barred. If recovery be had at all, it must be upon the coupons, when coupons are given.

Suppose a holder of a bond, cut off and destroy coupons so fast as they become due, can he fall back and claim interest upon the bond? Would not the effect be the same if he

sat by and held his coupons until the statute barred a recovery?

In Amy vs. Dubuque, 8 *Otto*, 470, the judgment of the Court is that the coupons in suit, are barred. Can the holder, after a bond becomes due, bring suit upon it and take judgment for interest represented by those coupons? If coupons can be abandoned in the case at bar, and judgment taken for the amount they represent on the face of the bond, it could yet be done in *Amy vs. Dubuque*.

Can coupons be barred, while the interest which they represent is not?

If the defendant in error, had intended to take that position in court, he should have clearly set it out in his complaint.

In this case the Court gave interest upon these installments or coupons, from the time they fell due. Can such installments be so far regarded causes of action as to draw interest if not paid when due, and not be subject to the statute of limitations?

Installments of interest can draw interest after due, only upon the principle, that a sum of money has become due, and an action could be maintained upon it, and that if payment be postponed, the obligor should pay interest. Can there be a case where interest follows non-payment of a sum of money because of the default, in which the statute of limitations would not run?

The act of the Legislature of March, 1872, above referred to provided:

"No action brought to recover any sum of money or any bond, coupon, interest warrant, agreement or promise, in writing, made or issued by any town * * or upon any installment of the principal or interest thereof, shall be maintained, &c., &c."

Here may be found a clear intention expressed to bar a recovery of any interest after it has been due six years. Independent of this statute was the following provision in force at the time these bonds were issued:

Revised Statutes of 1849. 643.

"The following actions shall be commenced within six years next after the cause of action shall accrue and not afterwards.

First. All actions of debt, founded upon any contract or liability not under seal."

Revised Statutes of 1858, 821, contained the following clause: "An action upon contract, obligation or liability, express or implied, excepting those mentioned in sections fifteen and sixteen,' (referring to judgments and special contracts) shall be brought within six years from the time the cause of action shall accrue." These provisions are still retained. *Revised Statutes of* 1878, *page* 1016. These statutes refer to all actions founded upon contracts or liability, not under seal, and it is difficult to see why they should not apply to installments of interest accruing upon bonds from year to year.

IV

If it be held that this action is properly brought to recover interest accruing upon the bonds from year to year, since 1857, disregarding the coupons attached, and that the statute of limitations does not bar a recovery, then we say the Court erred in allowing interest upon such installments of interest after they became due.

The interest clause in the bond is as follows: "With interest at the rate of eight per cent. per annum, payable on presentation of the annexed interest warrants at said

bank on the first day of each July and January, ensuing the date hereof."

If it be said that the obligor's promise was to pay interest when the bond fell due, and that therefore, the statute did not begin to run against such interest, until it began to run against the principal sum also, we answer, that such a default in the payment of interest, as would draw after it interest as a consequence, did not exist, until the period was reached when the statute began to run against both principal and interest. In other words, in the absence of an express contract, the statute of limitations and interest must begin to run at the same time, and go hand in hand.

Interest upon these installments of interest, can be allowed only upon the theory that such installments, so fast as they become due, form a new principal.

Benschooten vs. Lansen, 6 *John Clarecy Reps.*, 313. *Stakely vs. Thompson*, 34 *Penn. State.* 210. *Leonard vs. Villars*, 23 *Ill.*, 377, *Ferry vs. Ferry*, 2 *Cush.*, 92. *Hastings vs. Wiswall*, 8 *Mass.*, 455. *Railroad vs. Elliot*, 57 *N. H.*, 397. This latter case is directly in point. *Mueller vs. McGregor*, 28 *Ohio Stat.* 265.

It is claimed, however, that the Supreme Court of Wisconsin, held in the case of *Mills vs the Town of Jefferson*, 20 *Wis.*, 50, that interest should be allowed upon interest, when it fell due annually. The action in that case was brought to recover upon coupons, and the Court allowed interest upon the coupons after they became due, as this Court has frequently done.

It is said, however, that the language and reasoning of the Court favors the allowance of interest upon installments of interest, whether coupons be issued or not. In that light,

the decision would sustain, the principle here contended for, and would apply the statute of limitations to such installments of interest, upon the ground that a cause of action had accrued. It is for that reason the Court allowed interest.

The learned Judge who wrote that opinion, said as follows, on pages 56 and 57:

"The debtor withholds from the creditor his due as much when he fails to pay interest, accruing on his contract, as when he makes default in the payment of principal. * *

Interest payable annually or semi-annually, may be demanded and recovered as it becomes due according to the authorities."

After this decision, the Legislature of the state put an interpretation upon the law, fixing the rate of interest in the following form: *Chap.* 60, *Laws of* 1868.

"It is declared that the true intent and meaning of *Sections* 1 *and* 2. *Chap.* 160, *Laws of* 1859, and all other laws enacted in this State, prescribing the rate of interest, that interest shall not be compounded, or bear interest upon interest, unless an agreement to that effect was clearly expressed in writing, and signed by the party to be charged therewith."

Without pursuing this question, however, of allowing interest, we think it very clear that either the statute of limitations run against these several installments of interest, or such installments did not draw interest after maturity, and the Court erred in holding that the statute did not run.

In Amy vs. Dubuque, it was held that actions accrue upon installments of interest as soon as they become due, and that the statute of limitations then began to run.

Giving expression to this view, Mr. Justice Harlan remarks:

"Upon the non-payment at maturity of each coupon, the holder had a complete cause of action. In other words, he might have instituted his action to recover the amount thereof, at their respective maturities. From that date, therefore, the statute commenced to run against them."

Again. "Upon principle, his failure or neglect to detach the coupons and present it for payment at the time when, by contract, he was entitled to demand payment, could not prevent the statute from running from that date."

Since the foregoing argument was prepared, I have seen for the first time, the opinion of the learned Judge who tried this case. It may be found on pages 13, 14 and 15 of the *Printed Record*, and I desire to refer to the following portion of it:

"The object of attaching warrants for the payment of interest as it falls due, is to give commercial character and value to the bonds, by enabling the holder to detach them for presentation and payment when due, or to sell them as commercial paper before due, or if not paid when due, to enable the holder thereof, to bring a separate action to recover the amount represented by them. It is a mere matter of commercial convenience. They are part and parcel of the bond itself, until detached therefrom, or separate suit brought upon them. If relied upon as an independent cause of action, and a separate suit is brought upon them, undoubtedly the statute of limitations might be pleaded.

Amy vs. Dubuque, 98 *U. S.*, 470. But the holder is not compelled to bring a separate suit upon the coupons, but it is optional with him to do so, or wait until his bond

falls due as in this case, and then sue for principal and interest, basing his action upon the bond and not upon the coupons, or upon the bonds and coupons, as constituting one entire cause of action."

Three points seem to have been decided in the progress of litigation, involving this class of securities.

In Clark vs. Iowa City. 20 *Wal.*, 583, the Court held that the statute of limitations ran against coupons detached from the bond, from the day they fell due. *In Amy vs. Dubuque.* 98 *U. S.*, 470, this Court held the statute ran against coupons attached to a bond, the same as if detached, and that the coupons in that case were barred, although the bond was not yet due. In the case at bar, the Circuit Court has held that the statute of limitations would not run against coupons, if suit be brought on the principal of the bond and coupons together, treating the whole as one cause of action, conceding, that if a separate action be brought upon the coupons, they would be barred.

If this decision be correct, the effect of the statute of limitations is to depend upon the form of the action. By this rule, coupons once barred, may be included in an action upon the bond, and a recovery of the whole had. This construction, seems to me, is quite in conflict with the concluding paragraph of Mr. Justice Harlan's opinion in *Amy vs. Dubuque.* Referring to the effect of detaching coupons from a bond, he says:

"But this difference can not logically, in view of the Iowa decisions, affect the construction of the statute under examination. The right of the plaintiff in error to sue upon the coupon was complete after their non-payment, at maturity, whether they had been previously severed or not from the bond. Upon principle, his failure or neglect to detach the

coupon and present it for payment at the time when, by contract, he was entitled to demand payment, could not prevent the statute from running from that date. Such a construction of the statute, would defeat its manifest purpose which was to prevent the institution of actions founded upon written contracts. after the expiration of ten years, without suit, and from the time "these causes accrue," that is, from the time the right to sue attaches."

But, say the Circuit Court in this case, wait until the bond falls due, and bring the action upon it, and the barred coupons, treating all as one cause of action, and a recovery upon the coupons may be had. In this way the "manifest purpose" of the statute may be defeated.

If separating coupons from the bond would not change their relation to the statute of limitations as held in *Amy vs. Dubuque*, why should the bringing separate actions upon them, change their relation?

If the statute be a bar to any number of coupons, it is quite immaterial whether a recovery upon them be sought in a separate action, or conjointly with the bond. The bar is complete in either case.

The Circuit Court further says. *See Record, page* 14: "Suppose no coupons had been executed, and the bond had provided as this now does for the payment of interest semi-annually, the rule would be just the same. An action might be maintained every six months to recover the interest if not paid. But no one would suppose it to be necessary to bring such action, in order to prevent the statute from running upon the interest, or that it would not be optional with the holder to wait until the bond fell due and recover principal and interest for the entire time."

We call attention to the interest clause in the bond. *See*

page 3 *of Printed Record*, which makes the interest payable "on the first day of each July and January, ensuing the date thereof." Here is a day fixed for the payment of every installment of interest, just as much as there is for the principal sum. Each installment of interest, is just as much a sum of money or "cause of action" as the principal of the bond, and the statute which has been in force since 1839, provides: "The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards. * * Sub. 4. All actions of assumpsit, or on the case, founded on any contract or liability, expressed or implied." *Rev. Stat.* 1849, *page* 643. If each coupon or installment of interest is a separate cause of action, and the learned Judge concedes it is, why should not the holder be obliged "to bring such action in order to prevent the statute from running." Is there any thing about a coupon or installment of interest that should give the holder, not only six, but twenty-six years after it be comes due, as the Court held in this case, in which to bring his action? It is optional, says the Court, to bring or not to bring, the action in six years. Whence comes this option? No statute confers it, but on the contrary, it is forbidend. The statute applies to *all* causes of action, and says, suit shall be brought within six years, *and not afterwards.*

This action is, however, brought upon the bonds and coupons, each and every one of which constitutes a separate cause of action, and they are so treated in the complaint. The plaintiff below, claims judgment for the principal of the bonds and interest on them, only from the time they fell due, and judgment upon the coupons and interest upon them. They are set forth and treated as separate contracts, drawing interest, and each bond and each coupon must be

treated as a separate cause of action, all joined in one complaint. The Circuit Judge gives to these coupons the character of separate causes of action, or causes which can be joined with the principal in one action, at the option of the holder. If treated separately, he can not recover. If jointly, he can. We fail to see logic or reason in such a construction. The whole line of authorities, referred to by Mr. Justice Harlan, in *Amy vs. Dubuque*, for a judicial construction of the Iowa Statute, establishes clearly, that the statute of limitations runs upon installments of interest, as soon as they become due, whether coupons are used or not, and although these decisions are the basis of, and the authority which supports the conclusion of the Court in *Amy vs. Dubuque*, they are unfortunately in direct conflict with the case supposed, and the reasoning of the Court below.

Suppose a promisory note be given January 1st, for the payment of one thousand dollars in ten equal annual payments, with interest annually, on the first day of each year, ensuing would not the statute begin to run on the installment of principal at the end of the first year, as soon as it became due, and if it ran against this installment of principal, why not on the installment of interest also? Could the holder have his option to bring suit for the principal and interest which fell due at the end of the first year, or wait until the end of the ten years, when the whole sum would be due, treat the whole as one cause of action, and recover upon all the installments of principal, as well as interest?

We fail to see any reason why the holder of such a note might not wait and recover the entire amount, both principal and interest, as well as in this case.

L. B. CASWELL,
Attorney for the Plaintiff in error.

U. S. Supreme Court.

NO. 827.

THE TOWN OF KOSHKONONG,
Plaintiff in Error,

Against

OSCAR A. BURTON,
Defendant In Error.

REPLY OF PLAINTIFF IN ERROR

To the Brief and Argument of the Defendant in Error.

L. B. CASWELL,
For Plaintiff in Error.

"UNION" STEAM PRESSES,
Milwaukee Street,
Fort Atkinson, Wis.

Supreme Court of the United States.

THE TOWN OF KOSHKONONG
Plaintiff in Error,

Against

OSCAR A. BURTON,
Defendant in Error.

Brief and Argument in Reply to the Defendant in Error.

Passing over the general Statute of Limitations, the Counsel for the Defendant in Error, on page 8 of their Brief, claims that *Chapter* 53 *of the Laws of* 1872, the special enactment relating to bonds and coupons, is not applicable to this case, because the bonds in suit, are payable to "assigns", and the coupons to the "holder". This construction is too limited. The language of the act "payable to bearer or to some person or bearer, or to the order of some person, or to some person or order", is intended to include all classes of commercial paper. The language should be taken in its broadest and not technical sense. We think the word "holder" *is* synonymous with "bearer".

In Daniels' Negotiable Instruments referring to this class of obligations, *Section* 1496, the author uses the following language:

"Sometimes they are payable to the holder, which term is regarded as equivalent to bearer. Sometimes they are payable to a certain party or his assigns".

See also *Moran vs. Commissioner*, 2 *Black*, 728, where coupons were payable to "holder".

If, however, the Statute of 1872, is inapplicable, we need only refer to the General Statute, in force since 1839, as follows:

"Actions founded upon any contract, or liability, not under seal" to be commenced within six years "after the cause of action shall accrue. and not afterwards."

The Counsel make no effort to explain why this clause is not a bar, except upon the theory, that coupons, or installments of interest can not be barred until the principal sum is also barred. See page 7 of Counsel's Brief.

The language of the General Statute, however, is almost identical with the Iowa Statute. so successfully pleaded in *Amey vs. Dubuque*, 8 *Otto*, 470. The Legislature intended by *Chapter* 53, *Laws of* 1872, to change the Statute of Limitations on these specialties, or contracts under seal, from twenty, to six years.

Counsel in their Brief, page 11. say "good faith and common honesty, was not considered in this enactment, but that is the result of the dishonest purposes of the inhabitants of the towns, *etc.*, to defeat, in some way. the collection of the money secured by this class of securities".

No such bad faith or dishonorable motive should be inferred. We might as well urge that all Statutes of Limitation are subject to like criticism.

Statutes giving a reasonable time for bringing actions, have never been held in the light of repudiation.

Pryor to the passage of the act of 1872, a large number of cities and towns in the West, in their anxiety to aid the construction of Railroads, issued, almost without limit, these securities, many of which were misappropriated.

Holders neglected for years to present them for payment, as though they questioned their own right to enforce the collection. In the language of *Angel on Limitations, Sec.* 11, "The very fact of *acquiescence* or forbearance in him who has refrained to institute his claim, is, *in itself*, a strong presumption that it was the result of a consciousness on his part, that the claim is unfounded, or at least, extremely questionable".

It was settled that coupons draw interest from the time they fall due. The indebtedness of these municipalities was piling up, so as to threaten the future of the corporations themselves, as well as endanger the collection of their liabilities.

The Statute of 1872 was enacted to compel the presentation and prosecution of these securities within a reasonable time, both in the interests of the municipalities and the creditors. Six years was regarded sufficient time for that purpose. No good reason could be given why a contract under seal, should not be presented and collected in the same time given for the collection of contracts not under seal. Hence, the Statute of 1872 was enacted. The single effect of which was to reduce the time allowed for bringing action upon bonds under seal, and upon their coupons, on installments of interest. from twenty, to six years. The Supreme Court of Wisconsin had repeatedly held that it was competent for the Legislature to fix a limitation to

causes of actions already accrued, and the doctrine has been upheld by this Court. *See Sohn vs. Waterson*, 17 *Wal.* 596.

Let it be borne in mind, however, that the act of 1872, in no way changed the law, affecting the bonds and coupons in this suit. These instruments. not being under seal, were subject to the six years limitation under the general law, before, as well as after the passage of this act, and the charge of repudiation or of impairing these contracts, is not well founded, nor is the case of *Pereles vs. Watertown*. 6 *Bissel*, 79, referred to in Counsel's Brief, page 21, at all in point. In that case which was brought soon after the passage of the Act of 1872. the bonds in suit were under seal. The Act attempted to reduce the time from twenty years to six, giving one year, only, in which to bring actions upon causes already accrued, more than six years at the time the law was passed. Judge Hopkins pronounced the law ineffectual. His decision was predicated upon the idea, that one year was not a reasonable time given for bringing the action.

Whether one year was sufficient or not, is immaterial in this case. Eight years had elapsed after the passage of that Statute, before this action was instituted, and this Court has held that the lapse of the full time mentioned in the Statute, after its passage, is sufficient.

Sohn vs. Waterson, 17 *Wal.*, 596. 13 *Peters*, 62. 7 *Howard*, 778.

The Revised Statutes of 1878 do not effect this case, for these coupons were barred before the revision took effect.

Counsel in their Brief. insist that coupons are but a re petition of the interest clause in the bond. and that they have no separate existence as a contract.

They also urge that interest can in no case be barred until the principal debt is also barred.

This Court has, however, settled that coupons, at least, may be barred before the principal debt is barred. If coupons and installments of interest are the same, it must be conceded that the Statute will run against the one, as well as against the other. Again, for the purpose of showing that interest is a mere incident to the debt, and does not become barred until the debt is also barred, we are referred to two cases in Massachusetts and one in Vermont, where the Court in one of the cases, refused to allow interest upon coupons, and in the other two, upon the installments of interest after due, because coupons and interest did not form a new principal, and was a mere incident to the principal debt. All three of these cases are in direct conflict with the well settled doctrine of this Court.

Ferry vs. Ferry, 2 *Cush.*, 92, referred to, is the only case in which it was held the Statute of Limitations did not run. Interest was payable, not at stated times, but "annually", and the Court did not allow interest upon the yearly interest. They refer to *Shaw vs. R. R. Co.*, 16 *Gray*, 407, also cited by Counsel, on page 12 of their Brief. In this last case, the Court refuse to allow interest upon coupons.

In Bank vs. Doe, 19 *Vt.*, 463, cited by Counsel, the interest was payable "annually", and the Court denied interest. In these two States, interest on coupons, or installments of interest, is not allowed, and they hold that coupons or interest installments, are not barred until the principal debt is barred. If, however, the Courts of these States had adopted the rule that coupons and interest installments did draw interest after due, the same reasoning would have compelled them to hold, that the Statute of Limitations run against such coupons and interest insallments.

In the States where interest upon interest is allowed, it is upon the theory that a sum of money has become due, a cause of action has accrued, and if the money is not paid at maturity, these sums draw after them interest, as well as the Statute of Limitations. Can any unsealed contract in Wisconsin, draw interest by reason of a default of payment, more than six years, and still not be subject to the Statutory Bar? An affirmative answer would be, without reason or precedent.

Saunders, on Pleading and Evidence. 310, says: "The Statute begins to run as soon as there is a complete cause of action".

In Wilcox vs. Plumer, 4 *Peters*, 181, the Court say: "When might this action have been instituted, is the question, for from that time, the Statute must run".

In Amey vs. Dubuque, 8 *Otto, on page* 474, the Court say: "Upon the non-payment at maturity of each coupon, the holder had a complete cause of action. In other words, he might have instituted his action to recover the amount thereof, at their respective maturities. From that date, therefore the Statute commenced to run against them". The bonds and coupons involved in *Amey vs. Dubuque*. bore date and became due on the same days of those in the suit at bar. The interest clause in the bonds was essentially the same. There was no difference in the form of the action, except in this case, judgment is claimed for the principal and interest thereon, after maturity, and also upon the coupons attached; nothing is claimed in the complaint for interest on the bonds, prior to the date of their maturity. But the Plaintiff claims to recover *on the coupons*, as such. We can not see why the coupons, which had been past due

more than six years when the action was brought, should not share the same fate, and be subject to the same ruling as the coupons sued for in *Amey vs. Dubuque*.

It is useless for Counsel to claim "this action is not upon bonds more than six years past due when it was commenced, nor is it upon coupons or interest warrants, nor upon an installment of interest". See page 7 of their Brief.

The action *is* upon the bonds and coupons. The issue was joined, tried, and the finding made, with that understanding. See page 12 of the Record. The Court in the 4th finding, uses this language: "And as matter of law, the said Court finds that the Plaintiff is entitled to recover from the Defendant said sums of one thousand dollars, mentioned in said two bonds, or instruments in writing, amounting to two thousand dollars, *and the said several sums of money mentioned in the said seventy-six coupons, or interest warrants attached* to said two bonds or instruments in writing. * * * * and that the Statute of Limitations pleaded by the Defendant, has not run against or barred such recovery".

If the plaintiff intended to sue upon the bonds and claim interest by virtue of the clause in the body of the bonds, and not by virtue of the coupons, why did he not so allege in his complaint, and claim judgment for the principal, and interest thereon from the *date* of the bonds, instead of interest by, and through the coupons? We do not see why the Plaintiff in *Amey vs. Dubuque*, could not as well claim he was seeking to recover the interest due upon the bonds. and that possession of the coupons was the evidence of ownership of the interest, and that he was entitled to recover, not by virtue of the coupons, but by the interest clause in

the bond, which he also held. According to the opinion of the learned Circuit Judge, in this case, if he had brought his action for the interest due and unpaid upon the bond, he could have recovered, but having sued in form upon the coupons, he could not, because *they* were barred, though the interest which they represented, was not. I think such distinction illogical and untenable, and that if we follow the rules and reasoning laid down in *Clark vs. Iowa City*, and *Amey vs. Dubuque*, the plea of the Statute of Limitations is a bar to a recovery on all the coupons which were past due six years when the action was instituted.

L. B. CASWELL,

Attorney for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

THE TOWN OF KOSHKONONG,
Plaintiff in Error,

vs.

OSCAR A. BURTON,
Defendant in Error.

BRIEF AND POINTS OF DEFENDANT IN ERROR.

SLEEPER, WHITON & BROWN,
For Defendant in Error.

CHICAGO:
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1881.

Supreme Court of the United States.

THE TOWN OF KOSHKONONG,
Plaintiff in Error,

vs.

OSCAR A. BURTON,
Defendant in Error.

Brief and Points of Defendant in Error.

I.

The first point made by counsel in his brief is that the negotiable instruments upon which this action was brought are not bonds, because not under seal. The act of the Legislature under which they were issued, so far as necessary to present this question, is as follows:

Private Laws, 1856, Chapter 368.

"An act to authorize certain towns to aid in the construction of the St. Paul and Fond Du Lac Railroad."

"§ 1. The respective boards of supervisors of the towns of Koshkonong, etc., * * * are hereby authorized, on the conditions and for the purposes hereinafter mentioned, to issue the bonds of their respective towns for any sum of money not exceeding the amount of sixty thousand dollars in any one of said towns."

No election or other condition precedent was required before the supervisors might issue the bonds save in the town of Oak Grove, in the county of Dodge.

"§ 2. Such bonds shall be signed by the chairman of the supervisors, and countersigned by the town clerk; shall be of the denomination of five hundred dollars or of one thousand dollars each; shall be payable at such place as the board of supervisors issuing them may deem advisable, and shall be payable at a time specified therein not exceeding twenty years from the date, with interest, payable semi-annually, at not exceeding eight per cent. per annum."

"§ 3. Such bonds may be delivered in payment, at the value expressed on their face, for shares of stock to be subscribed by the supervisors, for the benefit of the town, in the capital stock of the Chicago, St. Paul and Fond Du Lac Railroad Company."

"§ 4. Before the supervisors shall issue and deliver any such bonds, the said railroad company shall give security, to the satisfaction of the supervisors, that the money arising from the sale of the bonds shall be faithfully applied to the construction of its road."

"§ 5. The shares of stock in said railroad company thus taken by any town, and all dividends arising therefrom, and the faith and credit of such town are hereby, and shall remain irrevocably pledged for the payment of the principal and interest of the bonds delivered in payment for such stock, but the supervisors may sell such stock, if authorized so to do, by a vote of an annual town meeting of their town, and thereafter the proceeds of

such sale, and the interest thereon, shall be and remain irrevocably pledged to pay the principal and interest of such bonds. The supervisors shall annually, or when it may become necessary, levy a tax on the taxable property of the town, sufficient to way the interest on such bonds."

1. The form of these instruments is identical, in substance, with those which have been issued by towns, cities, villages, counties and states, and even by the United States—and is in form and substance a bond. The only objection taken is that it is not sealed.

2. There was a time when, in a commercial sense, the sealing or not sealing these instruments might have been a distinguishing and material feature of them. Formerly a bond in this form under seal would not have been negotiable or assignable: *Clark* v. *Farmers Manufacturing Co.* 15 Wen. 256; *Steele* v. *The Oswego Cotton Manufacturing Co. Id.* 265; *Glyn* v. *Barker*, 13 East. 509. Long before these bonds were issued the courts had held them to be negotiable; and when the legislature of Wisconsin conferred the power on the Board of Supervisors, to issue bonds, the distinction between sealed and unsealed instruments had disappeared, so far as negotiability was concerned, the only difference being that, under the Statute of Limitations, actions on these bonds were barred in six years, while, had they been sealed the statute bar would have been twenty years. R. S. 1849, Chap. 127—§§ 14 and 20.

3. The Legislature did not use the word *bond* in a technical sense, nor with the intention that the instruments to be issued should be sealed instruments—deeds. That word was used because it was a name generally given to all securities issued by

municipal corporations, to aid in the construction of railroads or other public improvements. The Legislature did not have in view the particular kind of security to be issued, whether a simple contract or a specialty. All that it intended, was to clothe the officers of the town, with a power to take stock in this railroad corporation and deliver a security in payment for it, that should be negotiable, should be payable in the future, with interest payable at stated periods, and that would be available to the railroad company, as aid in constructing its road.

This is evident from the language of the second section of the act. Towns in the State of Wisconsin were corporations when this enabling act was passed. § 1, Chap. 12, Title IV, R. S. 1849. The board of supervisors of each town consisted of three persons, one of whom was designated as chairman. These supervisors and a town clerk were elected at each annual town meeting.

§ 6. The Supervisors had charge of all the affairs of the town §§ 55 to 59 inclusive, and the duties of the town clerk were prescribed by §§ 60 to 67 inclusive. Had the legislature not declared by what officers the bonds were to be signed, nor how they were to be executed, the Supervisors would have had the power to execute them in the name of the town, and to have provided by resolntion or order that they should, " be signed by the chairman of the super-" visors, and countersigned by the town clerk."

The act is not to be construed as merely declaring what officers should execute the bonds. It is more than that. It is a direction as to the form of the execution as well ; as to how they shall be executed what should be an execution of them.

If it were not, it was entirely unnecessary to have

said anything about who should perform the mere act of signing the *bonds*. When once the supervisors were authorized to issue the *bonds*, the power to execute followed. If it were merely intended to designate the officers, why say they shall be "countersigned by the town clerk?" Why not say they shall be executed by the chairman and clerk? But no! it was the purpose of the Legislature, as expressed in the act, to prescribe the manner and form of the execution, and although it called them *bonds*, the intention not to have them specialties is unmistakably shown by the language used. The *execution* was not required to be by sealing them, but by signing them by the chairman and countersigning them by the clerk. If it had been the intention that they should be sealed, it would have been so declared in the act. While these towns which are corporations may have a seal, as incident to their organization, still there is nothing in the statutes of the State requiring that they should, or that any act they may do shall be evidenced by a corporate seal.

It is not even said in the law under which they exist, *that they may have a seal*. If, therefore, it had been the purpose of the Legislature, that these *bonds* should be sealed, the act, which was so particular in saying to the chairman "SIGN," and to the town clerk "COUNTER-SIGN" would have directed—*at least authorized*—a corporate seal to be adopted, and would have said "*sealed with the corporate seal*," as well.

4. But these bonds were issued. They were delivered to the railroad company in payment for shares of stock, subscribed by the supervisors for the benefit of the town. The railroad company gave the security required by the act to be given. The

town either owns the stock now, or has the proceeds of the sale of it. We say this because the supervisors, being only authorized to issue them for that purpose, are presumed to have done their duty, and not to have delivered them for any other purpose than authorized by law, and because the bonds are payable to the railroad company and it has assigned them to the plaintiff.

The supervisors were authorized to subscribe for stock for the benefit of the town, and to pay for that stock in *bonds* to be issued for that purpose. This they have done; the railroad company has paid for them by its stock, and even though it may be, that these instruments ought to have been sealed, in order that the requirements of the act should have been fully and technically complied with, still, the town is estopped from setting up the want of a seal, after twenty years and more, as a defense to its promises to pay for the shares of that railroad company's stock. In *Whitney Arms Co.* v. *Barlow, et al.* 63 N. Y. at page 69, the Court say: "The plea of *ultra vires* should not as a general rule prevail, whether interposed for or against a corporation, when it would not advance justice, but on the contrary would accomplish a legal wrong," and on page 70: "It is now well settled that a corporation cannot avail itself of the defense of *ultra vires*, when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance and of the contract."

Mr. Justice Swayne, in *San Antonio v. Mehaffey*, 9 U. S. at page 315, quotes this language with approval, while holding that the plaintiff in error in that case would be estopped from urging as a defense the want of a seal on its bonds.

II.

The next point made by counsel is, that the action upon 64 of the coupons was barred by the Statute of Limitations. He predicates his position upon these provisions of the statutes.

1. The statute in force when the bonds were issued, which he quotes at page 5 of his brief.

2. The session laws of 1872, Chap. 53, also quoted at the same page.

3. The revised statutes, 1878, quoted at page 6 of his brief.

1. The statute in force when the bonds were issued, as set out in counsel's brief, requires "actions founded upon any contract or liability not under seal," to be commenced within six years next after the cause of action accrues. This action is brought on bonds due in 1877, with interest at 8 per cent. semi annually, and therefore was brought within six years next after it accrued, as to both principal and interest within the meaning of this statute. The interest is an incident of the debt, and recoverable with it.

Chap. 53, Laws 1872, does not embrace this action, and therefore it was not barred at the commencement thereof.

This action is not upon bonds more than six years past due when it was commenced. Nor is it upon coupons or interest warrants; nor upon an installment of interest. But it is as we have seen, upon bonds due January 1, 1877, drawing interest at eight per cent. payable semi annually, upon which only one year's interest had been paid.

2. These bonds and coupons are not such as are

described in the act, actions upon which are required to be commenced within six years. The act says: "When the same has been or shall be made *payable to bearer or to some person, or bearer or to the order of some person, or to some person or order.*"

These bonds are payable to the railroad company *or its assigns*, and the coupons are payable *to the holder*. It is a very different thing to make an instrument payable to bearer or to order, from making it payable to an assign. By the statute of Wisconsin, Revised Statutes, 1849, Chap. 44, § 1, and Revised Statutes 1878, Chap. 78, § 1675: "All notes "in writing, made and signed by any person, where- "by he shall promise to pay to any other person, or "his order, or to the order of any other person, or "unto the bearer any sum of money therein men- "tioned, shall be due and payable as therein ex- "pressed; and shall have the same effect, and be "negotiable in like manner, as inland bills of ex- "change, according to the custom of merchants."

This is substantially the statute of Anne, by which promissory notes were made negotiable. The Legislature, when it passed Chap. 53, Laws 1872, had in mind this section of the Revised Statutes, and included within its provisions only such instruments as were described in it, such as had the effect and were negotiable, like inland bills of exchange according to the custom of merchants. Had these bonds been made payable to the "Railroad company or order," a simple blank indorsement would have transferred the legal title to them, and authorized any holder to write over it a direction or order to pay the contents to himself or any person; such indorsement being according to the custom of merchants, in indorsing over inland bills of exchange. Or, in

other words, by the custom of merchants, inland bills of exchange were indorsed over by a blank indorsement, or by a full indorsement, in the latter case the indorsement was a bill of exchange written on the bill, and in the case of a blank indorsement the holder had authority to write a bill of exchange over the signature of the payee. The custom of merchants did not authorize or allow any other contract than that.

An assignment like that made on these bonds by the railroad company, was unknown to the custom or law of merchants. These bonds by their very terms, are not negotiable, that is, cannot be transferred in like manner, by indorsement, as inland bills of exchange may be. They could only be negotiated, that is, transferred by assignment in the form written on them, or that form in substance.

The coupons are payable to the "holder," but as "assignee" is not synonymous with "order" within the law merchant in an instrument of this kind, so "holder" is not synonymous with "bearer."

At common law an action on these bonds and coupons would not be barred in six years, and these Statutes of Limitations will not be extended to cases beyond the plain import of their language. So that if this action were upon the coupons annexed to these bonds, it would not be barred by either of these statutes.

3. The Revised Statutes of 1878 did not go into effect until November 1, 1878 (§ 4978.)

"These Revised Statutes shall take effect, and go "into operation on the first day of November, in "the year one thousand eight hundred and seventy-"eight; and on and after said day the Revised Stat-"utes of the year one thousand, eight hundred and

"fifty-eight, entitled 'an act for revising and consoli-
"dating the general statutes of the State of Wis-
"consin.' Approved May seventeenth, one thou-
"sand, eight hundred and fifty-eight, and the fol-
"lowing acts of the legislature, passed in the sever-
"al years hereinafter enumerated, shall be repealed.
"that is to say;" and the limitation only applies to actions accruing subsequently to the time when it took effect.

(§ 4984.) "In any case when a limitation or period
"of time prescribed in any act which is hereby re-
"pealed, for the acquiring of any right or the barring
"of any remedy, or for any other purpose, shall have
"begun to run, and a limitation or period of time for
"such purpose shall be prescribed in these revised
"statutes, the limitation or period prescribed by
"these statutes shall be held to apply only to such
"rights or remedies as shall accrue subsequently to
"the time when the same shall take effect; and the
"act repealed shall be held to continue in force and
"operative, to determine all such limitations, and
"periods of time which shall have previously begun
"to run, unless in special cases in these revised
"statutes, a different rule shall be prescribed."

So that it is by the revised statutes of 1849, and Chap. 53, Laws 1872, this case is to be determined.

So we repeat that, that act being on its face a special Statute of Limitations, embracing only "Any bond, coupon, interest warrant, agreement or promise in writing, made or issued by any town, county, city or village * * * when the same has been or shall be made payable to bearer or to some person or bearer, or to the order of some person, or to some person or order," cannot be pleaded in bar of this action, for the technical reason that

these bonds being payable to assigns and the coupons payable to holder, they do not come within the provisions of the act, even though your Honors shall be of opinion that a commercial indorsement would transfer the bond, and that an action could be maintained by a holder without indorsement.

The act is in derogation of the common law, and will be construed strictly, and will only be pleadable against these town, county, city or village securities, and then only when they are payable to bearer, some person or bearer, to the order of some person, or to some person or his order. The particularity with which the way the paper is payable is specified, precludes any other paper than that thus payable. It is evident from the history of the times, and from the universal repudiation of towns, counties, cities and villages, of their obligations issued in aid of railroad and other public improvements, that good faith and common honesty was not considered in this enactment, but that it is the result of the dishonest purpose of the inhabitants of the towns, etc., to defeat in some way the collection of the money secured by this class of securities. The Court ought to consider these things, and see to it that these fraudulent enactments are not extended beyond their letter.

4. We have said that this action is not brought upon coupons or interest warrants, nor upon installments of interest. We do not mean that we do not seek to recover the interest on the bonds, which had accrued from their date—only one year's interest having been paid. Our action is on the bonds. We have set out the whole contract in our complaint, as evidenced by the bonds and the coupons annexed, executed and delivered with the bond, forming a

part of it and partaking of its character. This point was expressly decided in *The City* v. *Lamson*, 9 Wallace, 477, where the action was brought on coupons before the bond became due, but which had been due by their terms more than six years, and the Statute of Limitations was pleaded. At page 482, this Court said: "These coupons are not received, or "intended to have the effect of extinguishing "the interest due on the bonds; as this collater- "al security, or rather this evidence of the interest, "upon well settled principles cannot have that ef- "fect without an express agrement between the par- "ties. *Besides, the coupons are given simply as a con- "venient mode of obtaining payment of the interest as it "becomes due on the bonds; there is no extinguishment "till payment.*"

And at page 483:

"The coupon is not an independent instrument, "like a promissory note for a sum of money, but "is given for interest thereafter to become due on "the bond, *which interest is parcel of the bond, and "partakes of its nature;* and the bond being of a "higher security than a simple contract debt, is not "barred by lapse of time short of twenty years; "and as we have seen this contemporaneous coupon "does not operate as an extinguishment of the in- "terest, unless there has been an express agreement "to that effect. *These coupons are substantially, but "copies from the body of the bond in respect to the in- "terest,*" &c. &c. &c. The same rule was held in *City of Lexington* v. *Butler*, 14 Wallace, at page 397.

In *Shaw et al.* v. *Norfolk County railroad company et al.* 16 Gray, 407, at page 415, the Court say; "these "coupons do not constitute any contract of them-

"selves; they are merely memoranda which are re-
"ceived by the obligees as evidence that the
"bearer of them is entitled to the amount specified
"in each, as interest which has accrued upon the
"bond to which it was attached." On page 416, the Court also say, that "the disallowance by the mas-
"ter of interest upon the interest coupons, after
"payment demanded thereof was correct. Interest
"upon interest which has accrued upon contracts,
"upon which interest is by its terms, payable at
"stated periods, before the principal becomes due,
"is never allowed in making up judgments in suits
"thereon."

In Massachusetts the rule is, that a party may recover interest as it becomes due, but in the suit to recover it, interest will not be allowed from the time if becomes due, and if he does not bring his suit for the interest, as he need not do, he will be deemed to have waived the annual interest, but many recover simple interest only.

Ferry v. *Ferry*, 2 Cush. at page 99.
Hastings v. *Wiswall*, 8 Mass. 455.
Henry v. *Flagg*, 13 Metcalf, at page 67.

In *Shaw* v. *The Railroad Co.*, *Supra*, the Court hold the same rule when interest coupons are made and attached to the bonds as when there are none, but the promise to pay interest at stated periods is found only in the note or bond. The rule in Wisconsin is different.

Mills v. *Town of Jefferson*, 20 Wis. 50.

5. This suit being brought on the bonds and coupons together, and no interest having been paid, the plaintiff below was entitled to interest on the principal from the date of the bond, nothwithstand-

ing, in the body of the bond it is agreed that the interest shall be paid "*semi-annually, on presentation of the annexed interest warrants at said bank,*" etc., and nothwithstanding that coupons for each payment of interest were annexed to the bond, and delivered with it. If these bonds had been payable in one year after their date, with interest payable on the last day of each month after the day of their date, and no coupons given, and action had been commenced on the bond one day before the expiration of six years after they became due, interest would have been allowed from the date of the bond, and the Statute of Limitations would not have been a good plea to any installment of interest, not even Chap. 53, laws 1872.

In *Ferry* v. *Ferry*, 2 Cushing, 92, the action was on a promissory note *attested by a subscribing*, dated Aug. 15, 1875, payable, "within three days after the death "of the widow, Hannah Ferry of Granby," with interest annually. The action was commenced October 4, 1847. Hannah Ferry died June 2, 1845. The Statute of Limitations was pleaded. It was contended that the first two years' interest was barred by the Statute of Limitations. At page 99, the Court say: "As to the first two years' interest, we think "that the action is not barred by the twenty years' "limitation (Rev. Stat. C. 120 § 7), because the inter- "est stipulated to be paid is regarded as *an incident of "the debt, and recoverable with it.* And although the "creditor may recover for interest which accrues be- "fore the principal becomes due, *yet if he forbear to "bring his action for that purpose, as he may, the inter- "est remains incident to the debt, and may be recovered "with it,*" and to the same effect is *Grafton Bank* v. *Doe*, 19 Vt. 463.

The Supreme Court of Wisconsin in *Mills* v. *The Town of Jefferson*, 20 Wis. 50, held the rule in relation to the computation of interest upon interest to be the same, whether there were interest warrants or only the promise to pay the interest at stated periods before the principal becomes due. See also *Rowe et al.* v. *Pierce*, 1 N. H. 179.

Such was the law in Wisconsin when these bonds were issued, and because such was the law, the Legislature attempted to change it by the enactment of 1868 referred to.

6. We now state these propositions of law.

1. By the general rules of law, interest is regarded as an incident of the principal or debt and recoverable with it, whether it be expressly agreed to be paid, or is allowed by way of damages for the non-payment of money at the time it is payable or agreed to be paid.

2. Where there is an express agreement in a note or bond to pay interest at stated periods, before the principal becomes due, the holder of the note or bond, may recover it by action when it becomes due, and in Wisconsin might, as the law stood when these bonds were issued, recover interest on it, from the time it becomes due, and that whether there be coupons or interest warrants, with the note or bond or not.

3. If the holder of a note or bond for payment of money at a future day, with interest at stated periods before the principal becomes due, and having coupons or interest warrants annexed, forbear to bring his action to recover the interest, as he may do, until the note or bond matures, he may then bring his action to recover the principal; and in making up the judgment in such action, he will be

entitled to recover all the interest which has accrued as incident to the debt, and in Wisconsin would, under the law as it stood when the bonds in question were negotiated, be entitled to legal interest on all the installments of interest, from the time they became due to the day of entering the judgment; and that, too, though some of the installments have been due more than the time prescribed by the Statute of Limitations for bringing actions on the bond or note after it becomes due.

4. That the coupons or interest warrants annexed to the bonds in this suit, were not given or received with the intent that they should have the effect to extinguish the interest due on the bonds; but simply as a convenient mode of obtaining payment of the interest as it became due which the holder might waive; the interest being a part of the bonds and partaking of their nature, and that the Statute of Limitations had not barred the recovery of any installment of interest, which had accrued on these bonds and simple interest on the installments of interest, when this action was commenced.

6. That neither the Statute of Limitations of the State of Wisconsin in force when these bonds were sssued, nor chapter 53, Laws 1872, nor any other statute in that State, can be pleaded or relied on in bar of a recovery of interest which has accrued, on the debt or principal of these bonds, unless they can also be pleaded and relied upon to bar the recovery of the principal.

So long as the action to recover the principal is not barred, the interest which is an incident to it, is recoverable with it. *Ferry* v. *Ferry*, 2 Cush. 92; *Grafton Bank* v. *Doe*, 19 Vt. 463. And in Wisconsin, interest at 7 per cent. is to be computed on the sev-

In other words: by these bonds the contract is, to pay the principal January 1, 1877, to pay interest at 8 per cent. on each first day of July and January, after their date, and if the interest was not paid as it became due, then to pay all unpaid interest January 1, 1877, with interest at 7 per cent. on each installment of interest unpaid, from the time it became due.

In 1865, in an action to recover instalments of interest on this class of securities, the Supreme Court of Wisconsin declared the contract to be, to pay interest on instalments of interest after due. In three years after that, the Legislature attempted to review and reverse this judgment of the Supreme Court, and to take away a substantial part of these municipal obligations.

In 1872, the Legislature, knowing that there were a large number of this class of securities outstanding in the State; that the municipalities were resisting collection in every possible way, and knowing that by the law as it then stood in the State, the obligation of these contracts was as we have above set it out, again attempted change these contracts by the passage of Chap. 53. If it shall be held by this court that the plaintiff in this case is not entitled to recover all the interest that has accrued on these bonds, and which remains unpaid, with interest at 7 per cent on each instalment, then the Legislature of Wisconsin will have been successful in its attempts to assist its municipalities to repudiate their obligations under its sanction.

We make this point, therefore, that in so far as chapter 53, Laws 1872, affects the right of the plaintiff in this case to recover in this action all the installments of interest which remain unpaid, with

interest at 7 per cent. from the time they became due, it impairs the obligation of these contracts and is unconstitutional and void. *Edwards* v. *Kearzey*, 96 U. S. 595.

Had the act been, that in an action on the bond, interest should only be computed or recovered, for six years next before the commencement of the action, and that no interest should be computed upon the installments of interest after they became due, there would be no question as to the unconstitionality of it. There ought to be no question of it, even though it presents itself under the guise of a Statute of Limitations, pretending that it only affects the remedy. The obligation of these contracts to pay all unpaid installments of interest when the bonds matured, with 7 per cent. interest is destroyed just as effectually, and the town relieved from its performance as absolutely, as it would have been by the act supposed.

Counsel has not in his brief alluded to one matter, which is referred to in the opinion of Judge Bunn, in the Court below. We do not know whether he overlooked it, or whether he intends to refer to, and argue it in his reply to our argument, after he has seen it. We refer to Chap. 160, Laws of 1868, which is quoted in the opinion at page 15, of the printed record, and §1689, R. S. 1878. Three questions arise upon this statute.

1. What was the construction of the statute regulating the rate of interest, when these bonds were issued, as to whether installments of interest drew interest after due, and whether in a suit to recover the principal, in making up the judgment upon it, interest was under that statute to be computed upon the installments of interest after they became

The allegations of our complaint are no different in law than if it had said there was due on the bonds two thousand dollars, and interest at 8 per cent. from January 1, 1877, and also upon the several installments of unpaid interest the further sum of three thousand and forty dollars and interest at 7 per cent. on each installment of interest from the time it became, etc. The recitals as to the coupons were by way of inducement explanatory of the whole transaction. *City* v. *Lamson, supra.*

It must also be borne in mind that we did not recover *compound* interest in the Court below, but only *simple* interest on installments of interest over due.

IV.

§ 4 of the act under which these bonds were issued, is as follows: "Before the supervisors shall is-"sue and deliver any such bonds, the said Railroad "Company shall give security, to the satisfaction of "the supervisors, that *the money arising from the sale* "*of the bonds* shall be faithfully applied to the con-"struction of its road."

In *Pereles* v. *City of Watertown*, 6 Bissell, 79, the late learned Judge Hopkins, of the Western District of Wisconsin, held Chapter 53, Laws 1872, unconstitutional and void so far as it affects municipal bonds issued before its passage. The opinion is well reasoned and exhaustive, and we ask your Honors to read it. It is too long to insert here. One ground on which the judge rests his decision is, that it appears those bonds were intended to be sold to capitalists out of Wisconsin, and that one year was too short a time to give the foreign holder in which to

bring his suit. The same question arises on these bonds.

We make a further point not referred to by Judge Hopkins, but clearly applicable to this case. We have seen that, by the laws of the State of Wisconsin, when these bonds were issued, installments of interest bore interest at the rate of 7% after they became due. By the general law of the commercial world, in an action upon a note or obligation for the payment of money at a future day, with interest payable at stated periods, before the principal became due, interest, if not paid as it became due, was recoverable, as an incident of the debt, from the time when by the terms of the contract, the principal drew interest, and that no installment of interest was barred by the Statute of Limitations, even though it had been due for a longer period of time than necessary, to bar an action to recover the principal after it became due. That while an action could be maintained to recover the principal, all interest unpaid thereon, should be computed in making up the judgment, no matter when it became due.

The Supreme Court of Wisconsin has not in any case, established a different rule in Wisconsin, so that we say, that was the law of Wisconsin at the date of these bonds, and that but for Chap. 53 Laws 1872, the plaintiff in this case, while he might have brought suit every six months, to recover the installments of interest, need not have done so; might have waited just as he did, till his bonds matured, and then brought his suit to recover the principal, and in that action would have recovered principal and all unpaid interest, and interest on the installments of interest.

on the bonds for the recovery of the installments of interest as they became due, and would have computed interest upon the installments, just as was done in those cases. The only effect the coupons had was, that they might be transferred to a party who did not hold the bonds, who could recover their contents without counting on the bond, while without them, the holder of the bond must have brought the suit. But whichever brought suit, and in either event, he, who brought the suit, would be entitled to interest on the money due from its maturity.

Those cases are authority for our position that, whether there be coupons or not, the installment of interest bears interest, except in those States where the courts have, by decisions established the rule that interest will not be computed on installments of interest.

Counsel in his brief claims that, because there were coupons with these bonds, and because we said in our complaint, "that there is now due him from "the defendant upon said two negotiable securities, "and the unpaid coupons thereto attached, the sum "of two thousand dollars, and interest thereon at "eight per cent. from January 1st, A. D. 1877; also "upon the unpaid coupons attached to the said bonds "the further sums following, viz: Eighty dollars "and interest thereon at 7 per cent. from July 1, "1858;" and so on stating the coupons on each bond in the same way to 1877, our action is brought on the bonds for the principal, and interest at 8% after due, and on the coupons as a separate and distinct cause of action from the bonds, and that therefore the same rule would apply, as if we had brought an action on coupons before the bonds were due, and where the coupons had been due more than six years.

bond, shall not be payable until after the time when the Statute of Limitations would bar an action on the same kind of a promise or obligation. The town should not be heard to say that any of these installments of interest are barred by the Statute of Limitations, when its officers have for more than twenty years neglected their plain duty, merely because the plaintiff has not vexed it with litigation to compel its officers to provide the money with which to pay these installments of interest, unless the positive law of the State compels the Court to hold the bar claimed in this case.

The cases cited by counsel in his brief of *Aurora* v. *West*, *Kenosha* v. *Lamon*, *Lexington* v. *Butler*, *Clark* v. *Iowa*, and *Amy* v. *Dubuque*, were all actions on the coupons brought before the maturity of the bonds, to recover installments of interest then past due. The question was not then presented in any of them, whether in a suit on the bond; for the recovery of the principal, the statute bar could not be pleaded to any installment of interest, where the bond itself provided for the payment of interest. We do not find that that question has ever been passed upon by this Court. There is a plain distinction between the cases cited, and this. There the actions were founded solely on the coupons, as separate, distinct and independent promises. The bonds were not counted upon, or introduced in evidence. In such cases we admit, this Court has held that the statute might be pleaded in bar. See the authorities collected on this class of questions, in Jones on R. R. securities, § 332, 340.

If there had been no coupons attached to the bonds in *Kenosha* v. *Lamon*, and *City of Lexington* v. *Butler*, this court would have sustained the actions

due, and was it competent for the legislature to construe the statute by legislative enactment.

2. Did the legislature intend to make the amendment to §2 of the act of 1860, applicable to contracts entered into before its passage ; and if so, was it competent for it to do so?

3. Does § 1689, R. S. 1878, apply to these bonds and coupons, and if so, was it in the power of the Legislature to give it a retroactive effect?

Judge Bunn has discussed these questions very fully, and come to the conclusion that, notwithstanding these statutes, the plaintiff was entitled to interest on the installments of interest.

We will, however, say a word upon the questions.

1. The Supreme Court of Wisconsin had construed the statute as it was, and held that under it interest was to be computed on installments of interest after due. *Mills* v. *Town of Jefferson*, 20 Wis. 50; *Spencer* v. *Maxford*, 16 Wis. 178. It was in consequence of the decision in *Mills* v. *Jefferson*, that the Legislature performed this feat of construing the statute, in 1868, and attempted to prevent the recovery of interest upon interest in the future, as well as the attempt in 1872 to bar actions which had then accrued, or might thereafter accrue, on these particular kind of securities.

It was not competent for the legislature of Wisconsin to construe a statute enacted by a previous legislature, for in so doing it trenched upon the functions of the judiciary. If such an attempt is made it can only effect transactions originating after such attempt.

Wade on Retroactive Laws, § 31. *Ruser* v. *Wm. Tell, assignees*, 39 Penn. State, 137; *Haley* v. *Phila.* 68 Id. 45; *De Chastellux* v. *Fairchild*, 15 Id. 18; *Salters*

v. *Tobias*, 3 Paige, 338 and 344; *Colborn* v. *McLendan*, 42 Geo. 405; *Planters Bank* v. *Black*, 11 Smedes & Marshall, 43; *P. M. Guil* v. *Early*, 12 Wheaton, 136–148; *People* v. *Supervisors N. Y.* 16 N. Y. 424; *Dash* v. *Van Kirk*, 7 Johns, 498; *Ogden* v. *Blockridge*, 2 Cranch. 272.

Another thing may be said, Chap. 160 laws 1868, was repealed by the R. S. 1878. The substance of Sec. 1 of that chapter is not continued in this revission, and of course can have no effect, as a construing enactment.

2. When contracts have been entered into, in which the rate of interest is fixed by express agreement, or by operation of existing laws, it is not competent for a Legislature, subsequently to impair the obligation of that contract, by lessening the stipulated burden of interest.

Cooley Constitutional Lim. § 285, and 93 to 96.
Wade on Retroactive Laws, § 181.
Hubbard v. *Callahan*, 42 Conn. 524.
Kutz admr's v. *Same*, 28 Gratt. 840.
Hammer v. *Bank*, 1 Colden (Tenn.), 398.
Parmlee v. *Lawrence*, 48 Ill. 331.
Drake v. *Latham*, 50 Ill. 270.
Green v. *Biddle*, 8 Wheat. 1.
Finney v. *Ackerman*, 21 Wis. 271.
State v. *Com'rs*. 4 Wis. 414.
Sauter v. *Madison*, 15 Wis. 30.
Smith v. *Appleton*, 19 Wis. 468.
Edwards v. *Kearzey*, 96 U. S. 594.
8 *Cent. Law Jour.* 430.

In the light of these authorities we are prepared then to say that, when the bonds in question were issued, under the laws of Wis. then in force, as ex-

pounded by its Supreme Court in *Mills* v. *Jefferson*, 20 Wis. 54, the mode in which interest shall be computed was plainly established and a part of the contract with the holder of the bonds, and no subsequent legislation could alter or impair that contract.

It was competent for the town to give coupons for each installment of interest, or to stipulate to pay any lawful interest on such coupons, or the installment of interest for which it is given, after due, and in the absence of any express stipulation, then it bore 7 per cent. after due.

We also see that Sec. 1 of Ch. 160 Genl. Laws 1868, was simply an attempt of the Legislature to usurp the functions of a Court and must be regarded as nugatory; that if by Sec. 2 of the same chapter, the Legislature intended in any manner to change the rate of interest which the bonds drew, such an attempt would also be nugatory, as impairing the obligation of the contract.

If the language of § 2 would reach to a case of this kind, and if it were within the constitutional power of the Legislature to reduce the interest stipulated for in prior contracts, yet this section is not in explicit terms to have a retroactive effect on prior contracts, and such being the case, Courts will construe the act as prospective merely.

Berry v. *Doty*, 5 Wis. 605.
State v. *Atwood*, 11 Wis. 422.
Seamans v. *Custer*, 15 Wis. 548.
Hasbrouck v. *Milwaukee*, 13 Wis. 37.

By the laws in force in Wisconsin in 1857, when these bonds were issued, the rate of interest, where there was no agreement to the contrary, was seven per cent. per annum, but parties might contract for

a higher rate. The Supreme Court of that State in *Spencer* v. *Maxfield*, *16 Wis. 178*, decided in 1862, held that under the statute in relation to interest on a note dated April 16, 1857, and payable in three years, with interest at twelve per cent. after the first day of June, 1857, interest was to be computed at twelve per cent. until paid, or until judgment entered in a suit upon it.

Now suppose the Legislature, after this decision was made, had passed an act declaring that in such cases interest should only be recoverable at the rate of 7 per cent. after maturity of the note; would there be any doubt that the act would be declared by all courts as unconstitutional and void, as to contracts entered into prior to its passage, as impairing the obligation of the contract. It would, if applicable to prior contracts, take from the payee or holder of the obligation 5 per cent. per annum interest after maturity in cases where 12 per cent. was stipulated for.

The bonds, to which the coupons sued upon, in *Mills* v. *Jefferson*, 20 Wis. 50, were attached, were issued May 1, 1857. That case was decided in 1865, and as we have seen, it holds that, where a note or bond for the payment of money is payable in the future, with interest at stated periods before the principal is payable, the installments of interest bear interest from the time they became due. This act of 1868, in attempting to construe former statutes and providing that "In the computation of in-"terest upon any bond, note, or other instrument "or agreement, interest shall not be compounded, nor " shall interest thereon be construed to bear inter-" est," takes or attempts to take from the holder of prior obligations, if it be held to embrace them

within these provisions, interest on money due and owing to him, which, by the law of the State, he was entitled to recover and have, when the contract was made, as that law was declared by the Supreme Court before the act was passed.

Depriving the party of that interest, relieves the debtor from the performance of that part of his contract, and impairs the obligation of it, to that extent. Indeed, it completely and absolutely strikes out of the contract the words which the law inserted in it, to-wit: a promise to pay interest on the installments of interest, after they became due.

If §1689 R. S. 1878, shall be invoked as applicable to those contracts, what has already been said applies with equal force to it, with this addition, that that section differs from § 2 Chap. 160, Laws 1868, and was adopted after all the semi-annual installments of interest on these bonds had matured.

SLEEPER, WHITON & BROWN,

For Defendant in Error.

ADDENDA.

Since the foregoing argument was printed, we have made some further examination of authorities, and given further thought to the questions of the statute bar pleaded in this case, and the right of the plaintiff to have the interest computed on the installments of interest, from the time they became due; and, while we would not be further tedious to your Honors, yet we crave your indulgence, and beg to submit the following ADDENDA:

The learned counsel finds his chief if not only comfort in the judgments of this Court in *Clark* v. *Iowa*, and *Amy* v. *Dubuque*. We have attempted to distinguish those cases from this, and hope we have succeeded. But we think we may state our position with a little more perspicuity than we have done. We see a clear difference between a case where the action is brought to recover an installment of interest, whether evidenced by coupons or the promise to pay interest by installments, is found only in the bond or note, and a case where the action is brought on the bond, and for the recovery of the interest which has accrued and has not been paid. In the former case, the plaintiff counts upon a separate and distinct promise, which by his own pleading he separates from the promise to pay the principal and the interest annually, as an incident to the principal, and entirely ignores the main promise, that is, the promise to pay the principal. This, after all, it seems to us, is the real ground upon which the decisions in those cases rest. When those actions were brought, the promise to pay the principal had not matured, and could not be counted upon. The only promise which could be counted upon was that to pay interest at stated periods before the principal could be recovered.

If, therefore, the creditor elects to bring his action for the interest as it accrues, and thus separates it from the principal demand, as a substantive cause of action, and not as a mere incident to the principal sum, the Statute of Limitations may be pleaded; while, as is said in *Ferry* v. *Ferry*, 2 Cush. 92; *Grafton Bank* v. *Doe et al.* 19 Vt. 463; if he forbear, as he may, to bring his action for that purpose, *the interest*

remains incident to the debt, and is recoverable with it. In *Grafton Bank v. Doe et al.*, the case was a bill to foreclose a mortgage. One installment of interest had been due so long that, had it been principal, it would have been barred by the Statute. The Statute was interposed; the Court said: "If this exception should prevail, we suppose it will not be contended that it should operate upon more than one "year's interest. But we do not think this exception well taken. It is true that the orators might "have instituted their suit for the recovery of the "year's interest, *but they were not bound to do it.* The "Statute does not begin to run upon the demand, "until the *principal*, or at least some *separate* and *distinct portion* of the principal becomes due and payable, and then only upon such separate and distinct portion. The accruing interest from year "to year is not thus separated from the *principal* "*demand*, and consequently the Statute of Limitations does not run upon it, until the principal is "barred by the Statute."

In *Cromwell* v. *County of Sac*, 96 U. S. 51, the question was, whether an overdue coupon attached to one of the bonds of the county, did not render the bond dishonored paper, so as to subject it, and subsequently maturing coupons, to defenses good against the original payee. It was held that it did not; and on page 58, the court say: "The interest "stipulated *was a mere incident of the debt.* The holder "of the bond had his option to insist upon its payment when due, *or to allow it to run until the maturity of the bond;* that is, until the principal was payable." You follow the case of *Bank of North America* v. *Kirby*, 108 Mass. 497, in which the court say at page 501:

"But in its effect upon the credit of a note, it is "manifest that a failure to pay interest is not to be "ranked with a failure to pay principal. *Interest is "an incident of the debt and differs from it in many "respects.* It is not subject to protest, and notice to "indorsers, or days of grace according to the law "merchant. Interest is not recovered on overdue

"interest: *and the Statute of Limitations does not run "against it until the principal is due.* The holder of a "note with interest payable annually loses no rights "against the parties to it, whether makers or indorsers "by neglecting to demand it; *and he has an election to "do so, or wait and collect it all with the principal."*

To the same effect is *Boss* v. *Hewitt*, 15 Wis. 260. In *Amy* v. *Dubuque*, *Bahr* v. *Arndt*, 9 Iowa, 37, and *Hershey* v. *Hershey*, 18 Id. 24, are referred to, as showing that installments of interest could be recovered in a suit brought to recover them before the note matured. No question was raised as to whether the statute of limitations could be pleaded in bar of an action to recover the interest, if not collected when due, and action were brought to recover principal and interest after the maturity of the note. We refer your Honors to the case of *Mun* v. *Cross*, 9 Iowa, 327, which was an action to foreclose a mortgage, the note being due, in which interest at ten per cent. per annum *was stipulated to be paid annually*. In the court below, interest at ten per cent. had been compounded. The Supreme Court held that to be erroneous, and then said: "Was he entitled to *six* per "cent on the interest annually? We think he was. "The respondent was under a legal obligation to "pay the interest at the end of the year; it was a "sum of money then due, without a contract fixing "the rate of interest upon it, and which he "might have been sued. He was therefore bound "to pay its legal value, which by our law, in the "absence of a written agreement reserving more, is "fixed at six on the hundred."

Thus, if your Honors please, we see that in Iowa as in Wisconsin, a separate suit may be brought to recover the yearly or other periodical interest as it becomes due, but if it be not brought, but the creditor wait till the principal becomes due, and then sues to recover principal and interest, he will recover interest upon the interest. That the interest is considered as the incident of the debt, *Boss* v. *Hewitt*, *supra*, and we say the natural legal deduction follows, that the Statute of Limitations will not prevail

against any installment of interest, if pleaded in that suit, however it may be when a suit is brought to recover interest only, before the principal is due.

In *Talliaferro's Exrs.* v. *King's Admr. and heirs*, 9 Dana, (Ky.) 337, decided in the Court of Appeals May 6, 1840, the action was on a note in these words:

"For value received, I promise to pay to George C. "Talliaferro, six hundred dollars, on or before the "29th day of June, 1829; yet it is understood that "the interest is to be paid at the end of each year. "As witness my hand, this 29th day of June, 1822."

It does not appear when the suit was commenced, nor that the Statute of Limitations was pleaded. The Court say: The only question was whether interest should be allowed upon the interest from the end of each year when the same fell due. The circuit court had refused it, the Court of Appeals reversed the judgment for that error, and remanded it, with directions to compute interest upon the interest. We have found no case in States where interest on interest is allowed, where the existence or non-existence of coupons has made any difference with the allowance of interest. And in Massachusetts, where it is not allowed, as we have seen, the existence of coupons did not change the rule. *Shaw* v. *The Railroad Co.* 16 Gray, 405, cited in the argument.

We do not believe that, in *Clark* v. *Iowa*, and *Amy* v. *Dubuque*, your Honors would have held any of the coupons or installments of interest barred by the statute, had the principal all been due, and the actions been brought on the bond to recover it and the interest as incident to it. We have no doubt you would have approved the rule as laid down in *Grafton Bank* v. *Doe et al.* and *Ferry* v. *Ferry*, and what was so well said in *National Bank of North America* v. *Kirby*—to wit: "*the Statute of Limitations does not run against it* (interest) *until the principal is due*," and that the holder of the note loses none of his rights against the parties to it, by neglecting to demand interest when it is due; "*and he has an election to do so, or wait and collect it all, with the principal.*"

SLEEPER, WHITON & BROWN.